# **ADVANCE SHEETS**

OF

# **CASES**

ARGUED AND DETERMINED IN THE

# **COURT OF APPEALS**

OF

# NORTH CAROLINA

APRIL 23, 2019

MAILING ADDRESS: The Judicial Department P. O. Box 2170, Raleigh, N. C. 27602-2170

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# NORTH CAROLINA

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## APPEAL AND ERROR—Continued

**Appeal and Error—plain error—evidentiary issue—**Evidence concerning defendant's attempts to hire counsel prior to his arrest was reviewed for plain error where defendant did not object at trial. Where an alleged constitutional error occurs during either jury instructions or on evidentiary issues, an appellate court must review for plain error if it is specifically and distinctly contended. **State v. Stroud, 200.** 

Appeal and Error—preservation of issues—best interests of child—failure to raise at permanency planning hearing—Although respondent mother contended that the trial court violated her constitutional rights in a child abuse and neglect case by concluding that guardianship was in the minor child's best interest without making findings that respondent was unfit or acted in a manner inconsistent with her constitutionally protected status, respondent did not raise the issue during any portion of the permanency planning hearing and thus waived it. In re C.P., 118.

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**Appeal and Error—preservation of issues—victim's sexual history—**Defendant did not preserve for appellate review the question of the victim's past sexual history in a prosecution for statutory rape and indecent liberties where defendant did not make an offer of proof. Defendant made no application to the trial court for a determination of the relevance of the behavior about which he wished to question the victim and no hearing was held. **State v. Parlier, 185.** 

# CHILD ABUSE, DEPENDENCY, AND NEGLECT

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# COLLATERAL ESTOPPEL AND RES JUDICATA

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#### CONFESSIONS AND INCRIMINATING STATEMENTS

Confessions and Incriminating Statements—videotaped confession—not custodial—The videotaped confession of a defendant in a statutory rape and indecent liberties trial was admissible even though defendant contended that it was elicited in a custodial interrogation without *Miranda* warnings. There was no custodial interrogation; although any interview of a suspect by a police officer has been recognized to have coercive aspects, here there was neither a formal arrest nor a restraint on freedom of the degree associated with a formal arrest, and a reasonable person in this defendant's position would not have understood it to be a custodial interrogation. State v. Parlier, 185.

# CONSTITUTIONAL LAW

Constitutional Law—felony murder—juvenile sentencing—A defendant who was fifteen years old when he was convicted of felony murder and sentenced to life in prison with the possibility of parole after twenty-five years did not show the existence of circumstances indicating that the sentence was particularly cruel and unusual as applied to him. The U.S. Supreme Court has not indicated that the individualized sentencing required in Miller v. Alabama, 183 L. Ed. 2d 407 (2012), extends to sentences beyond life without parole. However, there may be a case in which a mandatory sentence of life with parole for a juvenile is disproportionate in light of a particular defendant's age and immaturity. State v. Jefferson, 174.

Constitutional Law—juvenile sentencing for murder—issues noted but not addressed—In a case involving a juvenile sentenced to life in prison with the possibility of parole after twenty-five years, defendant did not raise the issue of whether his sentence violated the N.C. Constitution. Moreover, North Carolina remains the only state that permits juveniles as young as thirteen years old to be tried as adults without allowing them to appeal to return to the juvenile system—a provision which this defendant did not challenge. State v. Jefferson, 174.

Constitutional Law—plans to hire lawyer—pre-arrest—There was no plain error where two witnesses testified about defendant's plans to hire a lawyer before he was arrested, given the passing nature of the comments, the lack of emphasis or detailed discussion of the comments by the prosecutor, and the voluminous amount of other testimony and evidence. State v. Stroud, 200.

Constitutional Law—right to jury trial—waiver—constitutionally sufficient—The trial court did not err in its inquiry into defendant's waiver of a jury trial, and defendant's waiver was constitutionally sufficient where he consistently requested a bench trial throughout the proceedings, he was represented by counsel of his choice throughout the proceedings, and he never expressed any hesitation about his choice to waive his right to a jury trial. State v. Swink, 218.

## COUNTIES

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#### **CRIMINAL LAW**

Criminal Law—bench trial—alleged ineffective waiver of jury trial—no prejudice—Defendant was not able to show prejudice in a case in which he claimed that his bench trial was unauthorized because he was not indicted. Defendant was charged with raping a child and taking indecent liberties, he made a strategic decision to ask for a bench trial, and he was acquitted of two of the charges at the bench trial. State v. Swink, 218.

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#### **EVIDENCE**

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#### **FALSE PRETENSE**

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## **GUARDIAN AND WARD**

Guardian and Ward—guardianship—paternal grandfather—best interests of child—The trial court did not abuse its discretion in a child abuse and neglect case by concluding that guardianship with the paternal grandfather was in the minor child's best interest considering the totality of the court's findings. In re C.P., 118.

#### JURISDICTION

Jurisdiction—standing—insurance company action in own name—workers' compensation benefits—third party defendants—The trial court did not err in a negligence action seeking to recover workers' compensation benefits by granting defendant third party's motion to dismiss based on lack of standing. Plaintiff insurance company did not possess a statutory right to institute the action in its own

## JURISDICTION—Continued

name against defendant under N.C.G.S. § 97-10.2. Further, plaintiff failed to show the trial court abused its discretion by denying plaintiff's motion to substitute a party. **Key Risk Ins. Co. v. Peck, 127.** 

Jurisdiction—superior court—workers' compensation lien—subrogation lien—automobile accident—The superior court erred in a personal injury case arising out of an automobile accident by denying defendant Moody's motion to determine the amount of unnamed defendants' workers' compensation lien. When an injured employee is entitled to compensation from a third-party judgment or settlement, N.C.G.S. § 97-10.2(j) grants the superior court limited jurisdiction to determine the amount of an employer's or workers' compensation carrier's subrogation lien. Murray v. Moody, 141.

#### NARCOTICS

Narcotics—two substances mixed together—possession of particular substance—Defendant was not improperly convicted of possession with intent to manufacture, sell, or deliver (PWIMSD) 4-Methylethcathinone where he had already been convicted and sentenced for PWIMSD Methylone and argued that the two were the same substance under N.C.G.S. § 90-89 because they were mixed together. Possession of any mixture that contains any quantity of a Schedule I controlled substance is sufficient to charge a defendant with possession of the particular substance and to support a conviction for possession of the substance. This is true not only where the controlled substances are listed in separate schedules but also when the defendant is convicted of possession of two separate, distinct Schedule I substances. State v. Williams, 231.

#### **OPEN MEETINGS**

Open Meetings—closed sessions—minutes—properly redacted—Portions of board of education closed session minutes were properly redacted by the trial court. N.C.G.S. § 143-318.10(e) states that both minutes or an account of a closed session may be withheld from public inspection so long as public inspection would frustrate the purpose of the closed session. Times News Publ'g Co. v. Alamance-Burlington Bd. of Educ., 247.

Open Meetings—closed sessions—minutes—redacted—general account—In a case in which a newspaper sought to obtain an unredacted version of the minutes of closed sessions of a board of education, the trial court correctly determined that only certain portions of the minutes were subject to disclosure. The newspaper argued that even where minutes have been properly redacted, the Open Meetings Law requires a public body to create and make public a general account of the redacted portions with sufficient detail that members of the public would be able to reasonably understand what transpired at the meeting. However, where a public body has kept minutes which are sufficient to give someone not in attendance a reasonable understanding of what transpired, the public body has met its burden to create a general account. Times News Publ'g Co. v. Alamance-Burlington Bd. of Educ., 247.

## PUBLIC OFFICERS AND EMPLOYEES

Public Officers and Employees—correctional officer—wrongful termination—just cause—The administrative law judge (ALJ) did not err by concluding as

## PUBLIC OFFICERS AND EMPLOYEES—Continued

a matter of law that respondent North Carolina Department of Public Safety lacked just cause to terminate petitioner from his position as a correctional officer. The ALJ's conclusion that just cause existed for a written warning and a one week suspension without pay was also affirmed. Harris v. N.C. Dep't of Pub. Safety, 94.

#### REAL PROPERTY

**Real Property—partition—equities—**The trial court did not err in a partitioning proceeding for real property where defendant contended that plaintiff Alonza Ward had invoked the court's equitable powers with unclean hands because of his adulterous affair with his co-petitioner. Although partition proceedings are equitable in nature, it is well settled that a trial court will deny a cotenant's right of partition only where there has been an express or implied agreement not to partition or where partition would make it impossible to fulfill the terms of the agreement. The adulterous relationship had no bearing on the equities associated with the partitioning of a marital home. **Ward v. Ward, 253.** 

Real Property—partition—implied-in-fact contract—not found—The trial court did not err by partitioning a property by sale and dividing the proceeds equally, with plaintiff receiving one half of the maintenance expenses and taxes she had paid. The parties had separated and divorced without resolving ownership of the property, so that ownership was as tenants-in-common with defendant living in the house and paying the expenses. Although defendant contended that plaintiff Alonza Ward had waived his interest in the property through an implied-in-fact contract and that she was the sole owner of the property, the trial court found and concluded that there was neither a written agreement nor particular conduct or action sufficient to give rise to a contract implied-in-fact. There was competent evidence to support this finding, and the finding was sufficient to support the conclusion. Ward v. Ward, 253.

# **ROBBERY**

**Robbery—sufficiency of evidence—circumstantial**—The State presented substantial evidence to allow the jury to draw a reasonable inference that defendant was the perpetrator of a robbery with a dangerous weapon and larceny. Circumstantial evidence is all that a jury needs to deny a defendant's motion to dismiss, and it is then for the jury to resolve conflicts in the evidence. **State v. Stroud, 200.** 

# SENTENCING

Sentencing—felony murder—underlying felonies—A sentence for first-degree felony murder was not disturbed, but judgments for robbery with a dangerous weapon and larceny were arrested, and a conviction for possession of stolen goods was vacated without remand. When a defendant is convicted of felony murder, the underlying conviction merges into the felony conviction, and the trial court erred by failing to arrest judgment on defendant's conviction for robbery with a dangerous weapon. The other felony convictions in this case were not required to be arrested because all three felonies were related to the same event and were not separate convictions. Remand was not needed. State v. Stroud, 200.

#### **ZONING**

Zoning—review by trial court—contradiction of Board finding—The superior court's finding that a storage building was constructed in contradiction with a zoning permit contradicted the municipal zoning board's finding and substituted an alternative basis for a stop work order and notice of intent. The superior court may not substitute its own justification for that of the board with regard to findings and inferences from the evidence where a challenge is based upon whether substantial evidence exists to support the board's decision. Thompson v. Town of White Lake, 237.

Zoning—review by trial court—standard—The superior court used the wrong standard of review and entered its own findings in a zoning case involving a storage building allegedly intended for commercial use in a residential neighborhood. The whole record review applied to the superior court's review of the municipal zoning board's findings and inferences and de novo review applied to the board's conclusions of law and interpretation of the ordinance. The superior court's language and the act of finding facts made clear that it applied the de novo standard to all the issues in dispute, including the board's findings and inferences. Thompson v. Town of White Lake, 237.

# SCHEDULE FOR HEARING APPEALS DURING 2019 NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28 February 11 and 25 March 11 and 25 April 8 and 22 May 6 and 20 June 3 July None Scheduled August 5 and 19 September 2 (2<sup>nd</sup> Holiday), 16 and 30 October 14 and 28 November 11 (11th Holiday) December 2 Opinions will be filed on the first and third Tuesdays of each month.

[252 N.C. App. 94 (2017)]

#### STEVEN HARRIS, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA16-341

Filed 7 March 2017

# Public Officers and Employees—correctional officer—wrongful termination—just cause

The administrative law judge (ALJ) did not err by concluding as a matter of law that respondent North Carolina Department of Public Safety lacked just cause to terminate petitioner from his position as a correctional officer. The ALJ's conclusion that just cause existed for a written warning and a one week suspension without pay was also affirmed.

Chief Judge McGEE concurring in part and dissenting in part.

Appeal by respondent from final decision entered 25 January 2016 by Administrative Law Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 3 October 2016.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Tamika L. Henderson, for respondent.

TYSON, Judge.

The North Carolina Department of Public Safety ("Respondent") appeals from a final decision of the North Carolina Office of Administrative Hearings, which concluded as a matter of law that Respondent lacked just cause to terminate Steven Harris ("Petitioner") from his position as a correctional officer, and ordering his reinstatement. We affirm the decision of the administrative law judge.

# I. Background

Petitioner began working in February 2013 as a correctional officer at Maury Correctional Institution ("Maury Correctional"), a state prison operated by Respondent. Petitioner attended Respondent's basic training program and continued to be trained annually regarding Respondent's policies and procedures, including its Use of Force policy.

[252 N.C. App. 94 (2017)]

Petitioner's personnel record contained no disciplinary action prior to the incident at issue.

Petitioner was working the night shift at Maury Correctional on 5 February 2015. He was working in the "Gray Unit," which housed the prison's segregation cell block. Inmate Christopher Walls ("Walls") was housed on the Gray Unit. Walls placed his feces into a plastic bag and placed the bag into the toilet, which caused water to leak onto the floor. Walls then poured the feces onto the floor. In response to Walls' actions, Sergeant Vernell Grantham ordered Ronnie Johnson ("Officer Johnson"), Devon Alexander ("Officer Alexander"), and Dominique Sherman ("Officer Sherman") (together "the officers") to remove Walls from his cell to allow a janitor to clean up the feces and extinguish the stench.

The officers restrained Walls with handcuffs behind his back, a waist chain, and leg cuffs. Petitioner was not tasked with transporting Walls from his cell to another location. Officers Johnson, Alexander, and Sherman testified Petitioner approached Walls, stated to him: "You think this is funny" and punched Walls in the stomach. Walls was physically restrained, compliant, and under the other officers' control at the time Petitioner punched Walls. The officers each testified that Walls did not attempt to spit on Petitioner and was not offering any resistance at the time Petitioner punched him. While the Gray Unit is equipped with several security cameras, the incident was not captured, because it occurred in a blind spot inside the facility. Officer Johnson became upset and informed Petitioner that he was going to report him for punching the inmate.

Walls, the inmate, stated to Sergeant Grantham, "Y'all hit like bitches." Less than thirty minutes after the incident occurred, Walls was taken to and screened by medical personnel, who observed no bruising or redness on his abdomen. At no point in time did Walls complain that Petitioner had struck him or abused him in any way.

After the incident was reported, Respondent conducted an internal investigation, concluded Petitioner had violated Respondent's Use of Force policy, and recommended corrective action. Petitioner received a written notice, dated 14 April 2015, of a pre-disciplinary conference with Administrator Dennis Daniels and Administrative Services Manager Gary Parks, to be held the following day. The written notice stated the conference was to discuss a recommendation for Respondent to terminate Petitioner from his position for "unacceptable personal conduct." Petitioner was provided with the reasons his termination was recommended and was given an opportunity to respond to the allegations.

[252 N.C. App. 94 (2017)]

Following the conference, Respondent's management approved the recommendation to terminate Petitioner's employment. Petitioner was notified by letter dated 17 April 2015 that his employment was terminated for unacceptable personal conduct. Petitioner filed an appeal with the Employee Advisory Committee, which recommended Petitioner's dismissal be upheld. Respondent notified Petitioner by letter dated 29 June 2015 of its final agency decision upholding Petitioner's dismissal.

Petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings ("OAH"). The case was heard before an Administrative Law Judge ("the ALJ") on 23 October 2015. Following that hearing, the ALJ issued a final decision on 25 January 2016. The final decision contained twenty-seven findings of fact. Utilizing the framework established by our Supreme Court in N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004) and by this Court in Warren v. N.C. Dep't of Crime Control, 221 N.C. App 376, 726 S.E.2d 920, disc. review denied, 366 N.C. 408, 735 S.E.2d 175 (2012), the ALJ concluded as a matter of law that "[t]o the extent . . . Petitioner's conduct [punching Walls in his stomach] constituted unacceptable personal conduct, it does not rise to the level of conduct that would justify the severest sanction of dismissal under the totality of facts and circumstances of this contested case" and that "[i]t is not 'just' to terminate Petitioner[.]"

The ALJ reversed Respondent's decision to terminate Petitioner's employment, ordered Petitioner to be retroactively reinstated to his position of employment, and ordered a deduction from Petitioner's pay, equivalent to a one-week suspension. Respondent appeals.

# II. Jurisdiction

Pursuant to N.C. Gen. Stat. § 7A-29(a) (2015), an appeal as of right lies directly to this Court from a final decision of the Office of Administrative Hearings under G.S. 126-34.02. Respondent's appeal is properly before us.

# III. Issues

Respondent argues: (1) the ALJ erred as a matter of law by concluding Respondent failed to establish just cause to dismiss Petitioner for unacceptable personal conduct; (2) the ALJ erred as a matter of law by substituting his own judgment for that of Respondent and imposing new discipline upon Petitioner; (3) certain findings of fact and conclusion of law of the ALJ are not supported by substantial evidence, are unsupported by the findings of fact, or are affected by an error of law; and, (4) the ALJ erred as a matter of law by excluding evidence that was not specifically mentioned in Respondent's dismissal letter to Petitioner.

[252 N.C. App. 94 (2017)]

# IV. Just Cause for Dismissal

Respondent argues the ALJ erred by concluding Respondent failed to establish just cause for Petitioner's dismissal. We disagree.

# A. Statutory Scheme and Standard of Review for Determining Just Cause

In 2013, our General Assembly significantly amended and streamlined the procedure governing state employee grievances and contested case hearings, applicable to cases commencing on or after 21 August 2013. *See generally* 2013 N.C. Sess. Laws ch. 382. Our Supreme Court explained the previous statutory framework in detail in *Carroll*, 358 N.C. at 657-58, 599 S.E.2d at 893-94.

A career state employee who alleged he was dismissed, demoted, or suspended without pay without just cause under N.C. Gen. Stat. § 126-35 was first required to "pursue any grievance procedures established by the employing agency or department." *Id.* at 657, 599 S.E.2d at 893 (citations omitted). Once those internal grievance procedures were exhausted, the aggrieved employee could demand a formal, quasi-judicial evidentiary hearing before an ALJ by filing a contested case petition with the Office of Administrative Hearings. *Id.* The ALJ issued a "recommended decision," and each party was entitled to pursue an administrative appeal by filing exceptions and written arguments with the State Personnel Commission ("SPC"). *Id.* at 657, 599 S.E.2d at 893-94.

The SPC issued its final agency decision based on its "review of the parties' arguments and the materials preserved in the official record[.]" *Id.* at 658, 599 S.E.2d at 894. The SPC was authorized "to reinstate a wrongfully terminated employee and to order a salary adjustment or other suitable action to correct an improper disciplinary action." *Id.* (citation omitted). The SPC's decision was subject to judicial review upon the petition of either the employee or the employing agency in the superior court. *Id.* (citation omitted). The superior court's decision was subject to further review in the appellate division. *Id.* (citation omitted).

As part of the 2013 amendments, the General Assembly enacted N.C. Gen. Stat. §§ 126-34.01 and 126-34.02 into the North Carolina Human Resources Act. Under N.C. Gen. Stat. § 126-34.01 (2015), a State employee "having a grievance arising out of or due to the employee's employment" must first discuss the matter with the employee's supervisor, and then follow a grievance procedure approved by the North Carolina Human Resources Commission. The agency will issue a final decision, approved by the Office of State Human Resources. *Id.* 

[252 N.C. App. 94 (2017)]

While a final agency decision under the previous statutory framework included formal findings of fact and conclusions of law, a final agency decision under the current framework simply "set[s] forth the specific acts or omissions that are the basis of the employee's dismissal." 25 NCAC 01J .0613(4)(h) (2016).

Once a final agency decision is issued, a potential, current, or former State employee may appeal an adverse employment action as a contested case pursuant to the method provided in N.C. Gen. Stat. § 126-34.02 (2015). As relevant to the present case, N.C. Gen. Stat. § 126-34.02(a) provides:

- (a) [A] former State employee may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes. . . . In deciding cases under this section, the [ALJ] may grant the following relief:
  - (1) Reinstate any employee to the position from which the employee has been removed.
  - (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
  - (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.

One of the issues, which may be heard as a contested case under this statute, is whether just cause existed for dismissal, demotion, or suspension. As here, "[a] career State employee may allege that he or she was dismissed, demoted, or suspended for disciplinary reasons without just cause." N.C. Gen. Stat. § 126-34.02(b)(3). In such cases, "the burden of showing that a career State employee was discharged, demoted, or suspended for just cause rests with the employer." N.C. Gen. Stat. § 126-34.02(d). In a contested case, an "aggrieved party" is entitled to judicial review of a final decision of an administrative law judge [ALJ] by appeal directly to this Court. N.C. Gen. Stat. § 126-34.02(a); N.C. Gen. Stat. § 7A-29(a).

While Chapter 126 is silent on the issue, Chapter 150B, the Administrative Procedure Act, specifically governs the scope and standard of this Court's review of an administrative agency's final decision. See Overcash v. N.C. Dep't of Env't & Natural Res., 179 N.C. App. 697,

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702, 635 S.E.2d 442, 446 (2006), disc. review denied, 361 N.C. 220 (2007). Article 4 of Chapter 150B is entitled "Judicial Review," and includes N.C. Gen. Stat. § 150B-43:

[a]ny... person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the... person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article, *unless adequate procedure for judicial review is provided by another statute*.

N.C. Gen. Stat. § 150B-43 (2015) (emphasis supplied).

Chapter 150B also includes Section 51, which is entitled "Scope and standard of review." N.C. Gen. Stat. § 150B-51 (2015). The statute provides:

The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

Id.

The standard of review is dictated by the substantive nature of each assignment of error. N.C. Gen. Stat. § 150B-51(c); *Carroll*, 358 N.C. at 658, 599 S.E.2d at 894. "It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894-95 (brackets, quotation marks and citation omitted). The court engages in *de novo* review when the error asserted is within § 150B-51(b)(1), (2), (3), or (4). N.C. Gen. Stat.

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§ 150B-51(c). "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's." *Overcash*, 179 N.C. App. at 703, 635 S.E.2d at 446 (brackets, quotation marks, and citation omitted).

On the other hand, when the error asserted is within N.C. Gen. Stat. § 150B-51(b)(5) & (6), the reviewing court applies the "whole record standard of review." N.C. Gen. Stat. §150B-51(c). Under the whole record test,

[The court] may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Carroll, 358 N.C. at 660, 599 S.E.2d at 895 (internal citations and quotation marks omitted).

We undertake this review with a high degree of deference because it is well established that

"[i]n an administrative proceeding, it is the prerogative and duty of [the ALJ], once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or part the testimony of any witness."

N.C. Dep't of Pub. Safety v. Ledford, \_\_ N.C. App. \_\_, \_\_, 786 S.E.2d 50, 64 (2015) (quoting City of Rockingham v. N.C. Dep't of Env't. & Natural Res., 224 N.C. App. 228, 239, 736 S.E.2d 764, 771 (2012)), review allowed, \_\_ N.C. \_\_, 792 S.E.2d 152 (2016).

"[O]ur Supreme Court has made [it] clear that even under our *de novo* standard, a court reviewing a question of law in a contested case is without authority to make new findings of fact." *Id.* at \_\_\_, 786 S.E.2d 50, 63-64 (2015) (citing *Carroll*, 358 N.C. at 662, 599 S.E.2d at 896).

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In a contested case under the APA, as in a legal proceeding initiated in District or Superior Court, there is but one fact-finding hearing of record when witness demeanor may be directly observed. Thus, the ALJ who conducts a contested case hearing possesses those institutional advantages that make it appropriate for a reviewing court to defer to his or her findings of fact.

*Carroll*, 358 N.C. at 662, 599 S.E.2d at 896 (internal citations and quotations marks omitted).

Our separately writing colleague asserts the provisions of Chapter 150B are inapplicable because of N.C. Gen. Stat. § 150B-43, which states a person is entitled to judicial review of the final decision under Chapter 150B "unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute." N.C. Gen. Stat. § 150B-43 (2015). The separate opinion asserts N.C. Gen. Stat. § 126-34.02 is "another statute," which provides "an adequate procedure for judicial review." We disagree.

The provisions of Chapters 126 and 150B are not inconsistent. N.C. Gen. Stat. § 126-34.02 simply provides the employee's procedure to file a contested case, the issues the employee may bring before the ALJ, the types of relief the ALJ may impose, and the right to appeal directly to this Court from the ALJ's final decision. The scope and standard of review of this Court's review of the ALJ's final decision is expressly set forth in § 150B-51. Chapter 126 is silent on this issue. While Chapter 126 governs the proceeding before the ALJ and provides the aggrieved party the right to appeal to this Court, Chapter 150B sets forth our standard of review, which is the same standard of review that has been consistently applied by our appellate courts and is not contested by our separately writing colleague.

We perceive no intent, through the 2013 changes to this procedural framework, to alter the applicable standard of review. Consistent with the Administrative Procedure Act, the ALJ makes "a final decision or order that contains findings of fact and conclusions of law" in each contested case. N.C. Gen. Stat. § 150B-34(a). Respondent argues the ALJ must give deference to the agency in determining whether just cause exists for the agency's action.

Respondent's assertion is directly contrary to the express statutory burden established by the General Assembly for contested case hearings of this nature. Given that the statute explicitly places the burden of proof on the agency to show just cause exists for the discharge, demotion, or

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suspension of a career State employee, it is illogical for an ALJ to accord deference to an agency's legal conclusion and to the particular consequences or sanction imposed. *See* N.C. Gen. Stat. § 126-34.02(d)

An appellate court's standard of review of an agency's final decision—and now, an administrative law judge's final decision—has been, and remains, whole record on the findings of fact and *de novo* on the conclusions of law. *See Carroll*, 358 N.C. at 666-67, 599 S.E.2d at 898 (noting that whether just cause existed is a question of law which is reviewed *de novo* on appeal); *Blackburn v. N.C. Dept. of Pub. Safety*, \_\_\_\_ N.C. App. \_\_\_, \_\_, 784 S.E.2d 509, 518, *disc. review denied*, 786 S.E.2d 915 (2016) ("'Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency.'" (quoting *Souther v. New River Area Mental Health*, 142 N.C. App. 1, 4, 541 S.E.2d 750, 752, *aff'd per curiam*, 354 N.C. 209, 552 S.E.2d 162 (2001)).

An ALJ, reviewing an agency's decision to discipline a career State employee within the context of a contested case hearing, owes no deference to the agency's conclusion of law that either just cause existed or the proper consequences of the agency's action. This Court came to the same conclusion in a recent unpublished opinion. See Clark v. N.C. Dep't of Pub. Safety, \_\_ N.C. App. \_\_, \_\_, 791 S.E.2d 661, \_\_ (Sept. 6, 2016) (unpublished) (rejecting Respondent's argument that "the ALJ [improperly] substituted his own judgment for that of" the agency in holding that "whether just cause exists is a conclusion of law, which the ALJ had authority to review de novo." (citing Carroll, 358 N.C. at 666, 599 S.E.2d at 898)).

After receiving and considering the evidence, and entering findings of fact, an ALJ is free to substitute their judgment for that of the agency regarding the legal conclusion of whether just cause existed for the agency's action. Based upon the evidence presented and the findings of fact supporting the legal conclusion of just cause, the ALJ may order any remedy within the range provided in N.C. Gen. Stat. § 126-34.02, without regard to the initial agency's determination.

# B. Whether Petitioner's Conduct Warranted Termination

Respondent contends the ALJ erred in concluding Respondent's dismissal of Petitioner for unacceptable personal conduct was not supported by just cause. A career state employee subject to the North Carolina Human Resources Act may only be "discharged, suspended, or demoted for disciplinary reasons" upon a showing of "just cause." N.C. Gen. Stat. § 126-35(a) (2015). Under the North Carolina Administrative

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Code, "just cause" for the dismissal, suspension, or demotion of a career state employee may be established only on a showing of "unsatisfactory job performance, including grossly inefficient job performance," or "unacceptable personal conduct." 25 NCAC 1J .0604 (2016).

"Just cause, like justice itself, is not susceptible of precise definition." Carroll, 358 N.C. at 669, 599 S.E.2d at 900 (citations and quotation marks omitted). The term "just cause" has been interpreted by our Supreme Court as a "flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." Id. (citation and quotation marks omitted). "Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." Id.

In *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App. 376, 726 S.E.2d 920, this Court delineated a three-part inquiry to guide judges in determining whether just cause existed for an employee's dismissal for unacceptable personal conduct:

We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

*Warren*, 221 N.C. App. at 382-83, 726 S.E.2d at 925 (emphasis supplied) (citations and footnote omitted). The first two prongs of *Warren* are easily satisfied. The ALJ found and concluded as follows:

12. Here, the preponderance of the evidence shows that Petitioner engaged in the conduct alleged by Respondent. While there is some evidence to the contrary, the greater

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weight of evidence demonstrates that Petitioner struck a restrained inmate in the abdomen.

. . . .

18. Hitting inmate Walls while in restraints does not fit any of the categories identified for use of force. The only reason that makes any sense at all for the force used in this case is as some form of retribution for having defecated in his cell or to make a point that such behavior is not to be tolerated. Such behavior by Petitioner is prohibited. Hitting Walls was not "justified."

19. Thus, hitting a restrained inmate as found herein violates Respondent's Use of Force Policy and constitutes unacceptable personal conduct as Petitioner's conduct violates a written work rule.

As to the first prong, the unchallenged findings of fact tend to show Petitioner punched Walls in the stomach, without provocation, and at a time when Walls was restrained and under the control of multiple officers.

As to the second prong, Petitioner's conduct amounts to the "will-ful violation of known or written work rules," which is one of the listed instances of unacceptable conduct pursuant to 25 NCAC 1J .0614(8)(d) (2016). Petitioner had been trained and was aware of Respondent's Use of Force policy, which limited the use of force to "instances of justifiable self-defense, protection of others, protection of state property, prevention of escapes, and to maintain or regain control, and then only as a last resort" and noted that "[i]n no event is physical force justifiable as punishment."

We agree with the ALJ's finding of fact that punching Walls, while he was in restraints and under the control of other officers, "does not fit into any of the categories identified for use of force," and that force was used by Petitioner as "some form of retribution" for Walls' actions. We also agree with Respondent and the ALJ that the record evidence and the ALJ's conclusions support the determination that Petitioner's conduct constituted "unacceptable personal conduct" and warranted discipline for his actions. 25 NCAC 1J .0604.

Having found the first two *Warren* prongs satisfied, we proceed to a consideration of whether "[Petitioner's] misconduct amounted to just cause *for the disciplinary action taken*." *Warren*, 221 N.C. App. at 382-83, 726 S.E.2d at 925 (emphasis supplied). The ALJ found:

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- 28. In this contested case, there are considerable mitigating factors to consider. They are as follows:
- a. This Tribunal has found as fact and concluded as a matter of law there is sufficient probative evidence that Petitioner punched Walls in the stomach as alleged by Respondent in the dismissal letter. While Sgt. Grantham lacks credibility, the other correctional officers are credible. However, there are aspects of the facts that remain troubling and serve to mitigate in favor of Petitioner.
- b. The Petitioner has a good work history with Respondent generally and with inmate Walls in particular. There is no evidence of any prior instances of unacceptable personal conduct, disciplinary action, or anything in Petitioner's past suggesting he would engage in an act of excessive force against an inmate. His regular shift sergeant described him as a hard worker and an asset to his unit.
- c. Petitioner had a good working relationship with Walls, an inmate who has more than 100 adjudicated disciplinary infractions. Petitioner testified without contradiction that he was the staff member on his regular shift who could calm Walls down because Walls thought Petitioner was a fellow Muslim. There was no indication that Petitioner had a prior specific problem with Walls or any substantially negative prior interaction with Walls.
- d. This action took place when Petitioner was not working his regular shift. He was working with a supervisor (Grantham) and other correctional officers (Johnson, Sherman, and Alexander) with whom he had not worked before. It does not seem logical for Petitioner to punch an inmate without provocation while working with strangers.
- e. The medical evidence—or lack thereof—also militates in Petitioner's behalf. Petitioner is a very large man and inmate Walls is a small man. The Use of Force Medical screening conducted within half an hour of the alleged assault found (Petitioner's Exhibit 3E) no evidence whatsoever of Walls having been punched by anyone. There was no sign of any injury at all; not even redness.
- f. Among inmate Walls's many disciplinary issues, there were multiple complaints by Walls that he was assaulted

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by staff, all of which were unsubstantiated. On this occasion, Walls never claimed to anyone that he was assaulted by Petitioner. He did not file a grievance against Petitioner or write any statement against Petitioner as he had against other officers in the past.

- g. Walls also had a documented history of making fictitious or exaggerated medical complaints. On this occasion, less than 30 minutes after allegedly being punched by Petitioner, Walls made no complaints of pain or injury whatever and was in "no active distress," with "no complaints," even though he was being attended to in the medical clinic at the facility with every opportunity to complain. It strains credulity to conclude that an inmate with this kind of history would make no complaint whatever after receiving an unprovoked assault from a staff member.
- h. The statement "Y'all hit like bitches" attributed to Walls was plural, made no reference to Petitioner, and was spoken to Sergeant Grantham.
- i. Video taken moments after the supposed unprovoked assault shows Walls walking erect, smiling, and in no apparent distress. Petitioner and officers Sherman and Alexander appear to be engaged in friendly conversation and are smiling and at times laughing. Johnson is in front escorting the inmate, and is not engaged in the conversation, but the video fails to show him remonstrating with Petitioner or trying to keep Petitioner away from the inmate. Everything about the video shows a completely uneventful situation. Likewise, the video taken directly before the incident shows nothing unusual.
- j. There is no evidence that Walls ever bent over even in the slightest after having been hit by a very large man. He was not winded by having been punched. There was no evidence at all from any of the corrections officers of any physical reaction to having been punched.
- k. The facts that Walls made no complaint, that he made the statement to Grantham, that there was no physical reaction to having been punched, that there was no sign of assault in the physical exam and moments later he is walking as though nothing has happened are indicative that only one of two possible scenarios existed on that date

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and at that time: either (1) Petitioner did not hit inmate Walls at all, or (2) Petitioner did hit Walls but with such insignificant force that it was practically non-existent.

l. Having concluded that the three corrections officers' testimony was sufficiently credible and concluded that indeed Petitioner did strike inmate Walls, then the only rational conclusion based on the totality of the circumstances in this contested case is that Petitioner struck Walls with very little force.

These findings, which are challenged by Respondent, are listed in the ALJ's final decision under the heading "Conclusions of Law." However, they are more appropriately reviewed as findings of fact. See Barnette v. Lowe's Home Ctrs., Inc., \_\_ N.C. App. \_\_, \_\_, 785 S.E.2d 161, 165 (2016) ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law," while a "determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." (citation omitted)). We consider and review them as findings of fact, without regard to the given label. See N.C. State Bar v. Key, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) ("[C]lassification of an item within [an] order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review.").

As the sole fact-finder, the ALJ has both the duty and prerogative to determine the credibility of the witnesses, the weight and sufficiency of their testimony, "to draw inferences from the facts, and to sift and appraise conflicting and circumstantial evidence." *Ledford*, \_\_ N.C. App. at \_\_, 786 S.E.2d at 64 (citation omitted). We afford "a high degree of deference" to the ALJ's findings, when they are supported by substantial evidence in the record. *Id.* After reviewing the whole record, we find substantial evidence support the ALJ's findings, and they are binding on appeal. *See Carroll*, 358 N.C. at 660, 599 S.E.2d at 895.

Just cause is determined upon "examination of all the facts, circumstances, and equities of a case, [and] consideration of additional factors shedding light on the employee's conduct[.]" *Bulloch v. N.C. Dept. of Crime Control and Pub. Safety*, 223 N.C. App. 1, 12, 732 S.E.2d 373, 381, *disc. review denied*, 366 N.C. 418, 735 S.E.2d 178 (2012). The Court in *Warren* referred to this process as "balanc[ing] the equities." *Warren*, 221 N.C. App. at 382, 726 S.E.2d at 925. This Court recently explained, "A just and equitable determination of whether the unacceptable personal conduct constituted just cause for the disciplinary action taken requires

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consideration of the facts and circumstances of each case, *including mitigating factors.*" N.C. Dep't of Pub. Safety v. Shields, \_\_ N.C. App. \_\_, \_\_, 781 S.E.2d 718, \_\_ (Jan. 19, 2016) (unpublished), disc. review denied, \_\_ N.C. \_\_, 784 S.E.2d 176 (2016).

Based upon the evidence received and the findings set forth above, the ALJ determined Petitioner's conduct "does not rise to the level of conduct that would justify the severest sanction of dismissal under the totality of facts and circumstances of this contested case; it is not the 'right' thing to do." While we do not condone Respondent's behavior, we recognize the ALJ is the sole fact-finder, and the only tribunal with the ability to hear testimony, observe witnesses, and weigh credibility. As such, we defer to the ALJ's findings of fact, even if evidence was presented to support contrary findings. *Ledford*, \_\_ N.C. App. at \_\_, 786 S.E.2d at 64.

In consideration of the findings of fact set forth above, and after "balancing the equities," we hold the ALJ did not err in determining the agency did not meet its burden to show just cause for Respondent's termination. *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925.

# C. Imposition of Alternative Discipline by the ALJ

The North Carolina Administrative Code sets forth four disciplinary alternatives, which may be imposed against an employee upon a finding of just cause: "(1) written warning; (2) Disciplinary suspension without pay; (3) Demotion; and (4) Dismissal." 25 NCAC 1J.0604(a). "Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. . . . Just cause must be determined based upon an examination of the facts and circumstances of each individual case." Warren, 221 N.C. App. at 383, 726 S.E.2d at 925. Under the necessarily malleable judgment standard created by our precedents, and after considering the totality of the unique facts and circumstances of the present case, we affirm the ALJ's determination that just cause did not exist to impose the most severe form of discipline: dismissal from employment. See Carroll, 358 N.C. at 669, 599 S.E.2d at 900.

In a contested case, "the burden of showing a career State employee was discharged, demoted, or suspended for just cause rests with the employer." N.C. Gen. Stat. § 126-34.02(d). There are likely scenarios in which the employer meets its burden to show just cause exists to impose a disciplinary action, but just cause does not exist to support dismissal of the employee. The General Assembly recognized this range of possible sanctions and enacted N.C. Gen. Stat. § 126-34.02 as part of the 2013 amendments. The statute reads:

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- (a) Once a final agency decision has been issued in accordance with G.S. 126-34.01, an applicant for State employee may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes. The contested case must be filed within 30 days of receipt of the final agency decision. Except for cases of extraordinary cause shown, the Office of Administrative Hearings shall hear and issue a final decision in accordance with G.S. 150B-34 within 180 days from the commencement of the case. In deciding cases under this section, the Office of Administrative Hearings may grant the following relief:
  - (1) Reinstate any employee to the position from which the employee has been removed.
  - (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
  - (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the *improper action* of the appointing authority.

N.C. Gen. Stat. § 126-34.02(a) (2015) (emphases supplied).

Under subsection (a)(3) of the statute, the ALJ has express statutory authority to "[d]irect other suitable action" upon a finding that just cause does not exist for the particular action taken by the agency. Under the ALJ's *de novo* review, the authority to "[d]irect other suitable action" includes the authority to impose a less severe sanction as "relief." *See id.* 

Because the ALJ hears the evidence, determines the weight and credibility of the evidence, makes findings of fact, and "balanc[es] the equities," the ALJ has the authority under *de novo* review to impose an alternative discipline. Upon the ALJ's determination that the agency met the first two prongs of the *Warren* standard, but just cause does not exist for the particular disciplinary alternative imposed by the agency, the ALJ may impose an alternative sanction within the range of allowed dispositions. *See id.* We hold the ALJ acted within his authority by determining the agency failed to meet its burden to show just cause existed to warrant Petitioner's termination for unacceptable personal conduct.

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Our separately writing colleague states N.C. Gen. Stat. § 126-34.02(a)(3) is inapplicable, because "the ALJ could only invoke his or her powers pursuant to [this subsection] if it first determined there was no just cause for the termination of Petitioner's employment." The ALJ clearly determined just cause does not exist for Petitioner's termination. The separate opinion would impose the harshest alternative allowed as a sanction for unacceptable personal conduct. No process or standard is proposed to guide the substitution of the sanction for that imposed by the finder of fact.

The final decision states the ALJ "finds that there was not just cause to dismiss Petitioner for unacceptable personal conduct." (emphasis supplied). The ALJ heard the evidence, weighed the credibility, and determined dismissal of Petitioner was unwarranted under these facts, and imposed a written warning and a one-week suspension without pay. Under our de novo review, we agree the evidence and findings of fact tends to show just cause exists to impose discipline upon petitioner as a result of his unacceptable personal conduct. The ALJ imposed a sanction within the range of authorized disciplinary alternatives. See 25 N.C.A.C. 1J.0604(a).

# V. Conclusion

Under our *de novo* review of the existence of just cause, and giving whole record deference to the ALJ's findings of fact, the ALJ's conclusion that Petitioner's conduct "does not rise to the level of conduct that would justify the severest sanction of dismissal under the totality of facts and circumstances of this contested case," and dismissal of Petitioner "is not the 'right' thing to do" is affirmed. The ALJ's conclusion that just cause existed for a written warning and a one-week suspension without pay is also affirmed. The final decision of the ALJ is affirmed.

AFFIRMED.

Judge DIETZ concurs.

Chief Judge McGEE concurs in part, dissents in part, with separate opinion.

McGEE, Chief Judge, concurring in part and dissenting in part.

I concur in the majority's conclusion that an "administrative law judge, reviewing an agency's decision to discipline a career state employee . . . owes no deference to the agency's conclusion of law that

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. . . just cause existed" for the action taken by the agency. I also agree that "[a]fter receiving and considering the evidence, and entering findings of fact, an administrative law judge is free to substitute their judgment for that of the agency as to the legal conclusion of whether just cause . . . existed for the agency's action." However, I respectfully dissent from the majority's assertion that the standards of review provided in N.C. Gen. Stat. § 150B-51 apply to this case. I further dissent from the majority's conclusion, in its application of the three-prong "just cause" analysis created by this Court in *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App 376, 726 S.E.2d 920, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012), that Petitioner's actions in the present case did not give rise to just cause for his termination – the disciplinary action chosen by the agency.

# I. Changes in the Just Cause Statutory Framework

The present case is the first time this Court has interpreted the changes made to the statutory scheme for determining when just cause exists for an agency's disciplinary decision. See generally 2013 N.C. Sess. Laws ch. 382 ("the 2013 amendment"). The most significant change made by the 2013 amendment was to alter the role of the ALJ in the just cause determination process. Under the former statutory framework, an ALJ provided a "recommended decision," complete with findings of facts and conclusions of law, before entry of a final agency action. See N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 657-58, 599 S.E.2d 888, 893-94 (2004). Through the 2013 amendment, the General Assembly created N.C. Gen. Stat. §§ 126-34.01 and 126-34.02, and in doing so significantly shifted the role of the ALJ in the just cause determination process. A contested case hearing is now initiated in the Office of Administrative Hearings "[o]nce a final agency decision has been issued[.]" N.C. Gen. Stat. § 126-34.02(a) (2015). N.C. Gen. Stat. § 126-34.02 currently allows the ALJ to review an agency decision to terminate the employment of a career State employee under the following relevant circumstances:

(b) The following issues may be heard as contested cases after completion of the agency grievance procedure and the Office of State Human Resources review:

. . . .

(3) Just cause for dismissal, demotion, or suspension. – A career State employee may allege that he or she was dismissed, demoted, or suspended for disciplinary reasons without just cause.

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N.C. Gen. Stat. § 126-34.02(b)(3) (2015). The language of N.C. Gen. Stat. § 126-34.02(b)(3) allows a State employee to initiate a contested case in the Office of Administrative Hearings to review whether just cause existed to dismiss, demote, or suspend that employee. *Id.* There is nothing in the language of N.C.G.S. § 126-34.02(b)(3) to indicate that a career state employee may initiate a contested case to argue that he should have received a lesser disciplinary action, although just cause existed for the disciplinary action received.

Further, N.C. Gen. Stat. § 126-34.02(a) limits the Office of Administrative Hearings to the following relief when it has determined that the final agency decision was erroneous:

Once a final agency decision has been issued in accordance with G.S. 126-34.01, . . . a State employee, or former State employee may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes. . . . In deciding cases under this section, the Office of Administrative Hearings may grant the following relief:

- (1) Reinstate any employee to the position from which the employee has been removed.
- (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
- (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.

N.C. Gen. Stat. § 126-34.02 (2015). N.C. Gen. Stat. § 126-34.02(a)(2) is not relevant to the issue before us. N.C. Gen. Stat. § 126-34.02(a)(1) authorizes reinstatement of an employee if the ALJ in a contested case hearing determines that there was no just cause to terminate the employee. N.C.G.S. § 126-34.02(a)(1) does not specifically authorize the ALJ to grant any relief other than reinstatement if it determines that dismissal was not supported by just cause. N.C. Gen. Stat. § 126-34.02(a)(3) allows the ALJ to take other suitable action that may include actions not specifically mentioned in the statute, but only "to correct the abuse [or the 'improper action of the appointing authority']." *Id.* In other words, N.C.G.S. § 126-34.02(a)(3) only applies if the ALJ had determined that the final agency decision was erroneous. In the case before us, the ALJ could

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only invoke his or her powers pursuant to N.C.G.S. § 126-34.02(a)(3) if it first determined there was no just cause for the termination of Petitioner's employment.<sup>1</sup>

In short, the Office of Administrative Hearings is authorized by N.C.G.S. § 126-34.02 to take action in a contested case if it has first determined that the actual discipline included in the final agency decision was not supported by just cause. If the ALJ determines that there was just cause to support the final agency decision, it lacks authority to do anything other than affirm that decision.

While the majority principally cites and quotes from N.C.G.S. § 126-34.02, the majority simultaneously concludes that N.C. Gen. Stat.§ 150B-51 "governs the scope and standard of review of this Court's review of an administrative agency's final decision," and that "[t]he standard of review is dictated by the substantive nature of each assignment of error." (citations omitted). I disagree with any reliance the majority places on N.C.G.S. § 150B-51, a separate statutory framework which is, in my view, inapplicable to the present case. N.C.G.S. § 150B-51, a part of Article 4 of Chapter 150B of the General Statutes, is entitled "Judicial Review" and allows "[t]he court reviewing a final decision" of an ALJ to reverse or modify that decision under certain circumstances and under various standards of review. See N.C. Gen. Stat. §§ 150B-51(b)(1)-(6) (2015). N.C. Gen. Stat. § 150B-43, another statute in Article 4, describes when the procedure provided by Article 4 of Chapter 150B governs judicial review of an ALJ's decision, and when it does not:

Any party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.

N.C. Gen. Stat. § 150B-43 (2015) (emphasis added).

The procedure in Article 4 of Chapter 150B, including the standards of review in N.C.G.S. § 150B-51, are inapplicable because N.C.G.S.

<sup>1.</sup> I would further note that nothing in N.C.G.S. § 126-34.02(a)(3) suggests that an ALJ is granted authority to substitute his or her judgment for that of the relevant agency as to the correct disciplinary action to be imposed. N.C.G.S. § 126-34.02(a)(3) only gives the ALJ the authority to remedy any damages to a petitioner flowing from an incorrect discipline imposed by a final agency decision.

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§ 126-34.02, which states that "[aln aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals," serves as "another statute" which provides an "adequate procedure for judicial review" and thereby renders N.C.G.S. §§ 150B-43 through 150B-52 not relevant. This view is reinforced by reading N.C.G.S. § 126-34.02, which provides judicial review directly to the Court of Appeals, in pari materia with N.C.G.S. § 150B-45, which provides that, under the procedures set out in Article 4 of Chapter 150B, judicial review is undertaken first in superior court. See N.C. Gen. Stat. § 150B-45 (2015) ("To obtain judicial review of a final decision under [Article 4 of Chapter 150B], the person seeking review must file ... [a] petition for review ... in the superior court[.]"). Both statutes cannot control judicial review of contested case hearings of this nature, and because N.C.G.S. § 126-34.02 was specifically enacted to provide for judicial review directly to this Court, I find it to be the "adequate procedure for judicial review" contemplated by N.C.G.S. § 150B-43. Therefore, the statutory procedure set forth in Article 4 of Chapter 150B, including the standards of review in N.C.G.S. § 150B-51, are inapplicable.<sup>2</sup> I dissent from the majority's conclusion, to the extent that it holds that the standards of review contained in N.C.G.S. § 150B-51 are applicable to this case.

# II. Warren Analysis: Just Cause for Petitioner's Termination

N.C. Gen. Stat. § 126-35(a) provides: "No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. . . . The State Human Resources Commission may adopt, subject to the approval of the Governor, rules that define just cause." N.C. Gen. Stat. § 126-35(a) (2015). Exercising that delegated authority, the State Human Resources Commission has adopted rules, codified in the North Carolina Administrative Code, that define just cause for disciplinary action: "Either unsatisfactory or grossly inefficient job performance or unacceptable personal conduct as defined in 25 NCAC 1J .0614 of this Section constitute just cause for discipline or dismissal." 25 NCAC 01J .0604(c). Unacceptable personal conduct, the reason for dismissal in

<sup>2.</sup> While the standards of review provided in N.C.G.S. § 150B-51 are inapplicable, the standards of review that *are* applicable to judicial review of contested cases of this nature are well established, and are cited by the majority. Findings of fact are reviewed under the whole record test, and conclusions of law are reviewed *de novo. See N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 655, 599 S.E.2d 888, 898 (2004); *Barron v. Eastpointe Human Servs. LME*, \_\_\_\_ N.C. App. \_\_\_\_, 786 S.E.2d 306, 310-11 (2016).

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this case, includes "the willful violation of known or written work rules." 25 NCAC 01J .0614(8)(d).

In *Warren*, as noted by the majority, this Court delineated a three-part inquiry to guide courts in determining whether an employee was dismissed for "just cause" for unacceptable personal conduct:

[T]he best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

*Warren*, 221 N.C. App. at 382-83, 726 S.E.2d at 925 (citations and footnote omitted). Applying *Warren*'s framework in the present case, I, too, find the first two inquiries satisfied.<sup>3</sup> As to the first inquiry, the unchallenged findings of fact provide that Petitioner punched Walls in the stomach with his fist, without provocation, and at a time when Walls was restrained and under the complete control of multiple correctional officers. As to the second inquiry, Petitioner's conduct amounted to the "willful violation of known or written work rules," which is one of the instances of unacceptable personal conduct pursuant to 25 NCAC 01J .0614(8)(d).

However, I must disagree with the majority as to "the third inquiry: whether [the petitioner's] misconduct amounted to just cause for the disciplinary action taken." *Warren*, 221 N.C. App. at 382-83, 726 S.E.2d at 925. After considering the totality of the facts and circumstances of the present case, I believe Petitioner's actions of unacceptable personal

<sup>3.</sup> Although our Supreme Court is not bound by *Warren*'s three-prong analysis, *see*, e.g., *Northern Nat'l Life Ins. v. Miller Machine Co.*, 311 N.C. 62, 76, 316 S.E.22d 256, 265 (1984), *Warren*'s analysis is a helpful conceptualization of *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), and is useful in the just cause analysis.

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conduct gave rise to "just cause" for his termination by Respondent. The unchallenged findings show that Petitioner punched an inmate in the stomach with his fist, without justification, and while the inmate was restrained, compliant, and under the complete control of other correctional officers. The three correctional officers present at the scene, and tasked with removing Walls from his cell, testified as to Petitioner's actions, and their effect on Walls.

Officer Johnson testified that Petitioner entered through a side door, said to Walls, "you think this is funny," and punched Walls in the stomach. Officer Johnson explained that the "blow was unexpected," and it caused Walls to "ma[ke] a sound" and fall to the ground. Officer Alexander likewise described Walls' reaction to Petitioner's punch: "[Walls] grunted, leaned forward, shook his head, and stood back up." Petitioner found this funny, and "laugh[ed] all the way" from the scene of the assault to Walls' holding cell. Officer Johnson "couldn't believe [Petitioner] did what he did," and was so astonished that he needed "to clear [his] head." Petitioner later sought out Officer Johnson and, while refusing to answer "why [he] hit that inmate for no reason," explained that the fact the assault occurred in a known blind spot was not coincidental; Petitioner explained that he waited to strike until Walls was in a known blind spot: Petitioner explained to Officer Johnson that "[h]e knew where all the blind spots was [sic], and the camera didn't pick up nothing. Didn't see it." Petitioner also threatened Officer Johnson, telling Sergeant Grantham that "if [Officer] Johnson wrote anything against him, that he [Petitioner] was going to hurt Johnson."

Petitioner was aware of Respondent's Use of Force policy, which limited use of force to a "last resort" and prohibited force as a form of punishment. The reason for Petitioner's attack on Walls was not inmate safety, institutional security, or some other legitimate penological purpose; rather, Petitioner punched Walls as "some form of retribution" for spreading feces in his cell. The majority places great weight on various "mitigating factors" found by the ALJ including, *inter alia*: (1) Petitioner's good prior work history, including a "good working relationship with Walls;" (2) that Petitioner was not working his regular shift; (3) the absence of bruising on Walls thirty minutes after the assault; and (4) the fact that Walls was "walking erect, smiling, and in no apparent distress" after the incident.

Given the testimony of three correctional officers, who unanimously testified to Petitioner's use of unwarranted physical force on an inmate, Petitioner's prior work history or prior "good working relationship" with Walls has little relevance to the question of whether Respondent had

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just cause to terminate Petitioner. Regardless of his past work history, I find Petitioner's present acts troubling; Petitioner laid in wait until Walls was in a known blind spot, approached and punched him in the stomach as "some form of retribution" for spreading feces in his cell, found Walls' physical response to being punched funny, and subsequently threatened violence against another officer if that officer reported the incident. And while it appears to me that Petitioner's punch was of much greater force than the majority and the ALJ believe – Officer Johnson testified that the force of the punch brought Walls to the ground, and Officer Alexander characterized Walls as keeling over and shaking his head – the force of Petitioner's punch has little relevance to the just cause determination in the present case.

Notwithstanding Petitioner's positive performance reviews and his lack of problems preceding this incident, I would hold that a single incident of intentionally and maliciously punching a restrained and compliant inmate for no legitimate penological purpose in violation of Respondent's Use of Force policy amounts to unacceptable personal conduct that provides just cause for termination, regardless of the amount of force used.

Nearly all of North Carolina's correctional officers endeavor on a daily basis to ensure the public's safety and undertake their duties in a professional manner, and society calls on our correctional officers to make judgments to assure the safety and security of the public and inmates alike. See Blackburn v. N.C. Dep't of Pub. Safety, \_\_\_\_ N.C. App. \_\_\_\_, \_\_\_\_, 784 S.E.2d 509, 528 (2016) (noting that the "most important 'job requirement'" of a correctional officer is "that of exercising good judgment in a supervisory position of great responsibility"). Under the majority's rationale, so long as a correctional officer has maintained a positive work history and injures an inmate in a way that does not leave physical markings, Respondent does not have just cause to remove that officer from his or her position, a position of great trust and confidence. Id.

# III. Conclusion

I agree with the majority that an administrative law judge "owes no deference to the agency's conclusion of law that . . . just cause existed" for the action taken by the agency, and that "[a]fter receiving and considering the evidence, and entering findings of fact, an administrative law judge is free to substitute their judgment for that of the agency as to the legal conclusion of whether just cause . . . existed for the agency's action." However, I respectfully dissent from the majority's reliance on the standards of review in N.C.G.S. § 150B-51. Because judicial review is

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established for cases of this type in "another statute" – namely, N.C.G.S. § 126-34.02 – I believe N.C.G.S. § 150B-51 is not applicable to this case. I further dissent from the majority's application of *Warren*'s third prong, and would conclude that Petitioner's actions provided Respondent with just cause to terminate Petitioner for unacceptable personal conduct. Therefore, I would reverse the decision of the ALJ.

IN THE MATTER OF C.P., C.P., J.C., J.T.

No. COA16-808

Filed 7 March 2017

# 1. Appeal and Error—preservation of issues—best interests of child—failure to raise at permanency planning hearing

Although respondent mother contended that the trial court violated her constitutional rights in a child abuse and neglect case by concluding that guardianship was in the minor child's best interest without making findings that respondent was unfit or acted in a manner inconsistent with her constitutionally protected status, respondent did not raise the issue during any portion of the permanency planning hearing and thus waived it.

## 2. Guardian and Ward—guardianship—paternal grandfather—best interests of child

The trial court did not abuse its discretion in a child abuse and neglect case by concluding that guardianship with the paternal grandfather was in the minor child's best interest considering the totality of the court's findings.

## 3. Child Abuse, Dependency, and Neglect—paternal grandfather—guardian—adequacy of financial resources

The trial court did not err in a child abuse and neglect case when it did not verify that the paternal grandfather had adequate financial resources before appointing him as guardian to the minor child. The trial court considered the grandfather's long, close relationship with the minor child; his willingness to intervene in the proceedings; and the undisputed evidence of his demonstrated ability to fully provide for his grandson.

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Appeal by respondent-mother from order entered 9 May 2016 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 30 January 2017.

J. Thomas Diepenbrock, for respondent-appellant mother.

Associate Attorney Christopher C. Peace, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

K&L Gates LLP, by Associate Attorney Abigail F. Williams, for Guardian ad Litem.

CALABRIA, Judge.

Respondent appeals from the trial court's order awarding guardianship of her minor child, "James," to his paternal grandfather, Harold Outing ("Mr. Outing"). After careful review, we affirm.

## I. Background

On 13 March 2013, Mecklenburg County Department of Social Services, Division of Youth and Family Services ("YFS") received a referral alleging that a domestic violence incident had occurred between respondent and her boyfriend, the father of two of respondent's other minor children. The incident caused respondent's C-section stitches to break, and the boyfriend was charged with assault on a female. The charge was later dismissed, but YFS entered into safety plans with both respondent and her boyfriend.

Respondent and her children initially stayed with respondent's mother following the incident, but two weeks later, they moved in with the boyfriend, his mother, and his seventeen-year-old sister. On 17 June 2013, YFS received a referral alleging that James's three-month-old half-sister, "Charlene," had been sexually abused. Charlene was hospitalized for three days.

YFS and respondent entered into another safety plan, which required that she and her children return to their maternal grandmother's home. The maternal grandmother was to provide constant "eye/sight"

<sup>1.</sup> Pseudonyms are used to protect the identities of the minor children involved in this case and for ease of reading.

<sup>2.</sup> James's father is deceased.

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supervision of the children, and she and respondent agreed that they would not engage in violence in front of the children. However, on 15 July 2013, YFS received reports alleging that respondent and her mother had engaged in multiple acts of domestic violence in the children's presence. Respondent was charged with damage to property and violation of a domestic violence protective order as a result of the incidents. The maternal grandmother told YFS that she was "overwhelmed" and could only provide care for the children through 16 July 2013.

On 17 July 2013, YFS filed a petition alleging that James and his half-siblings were abused, neglected, and dependent juveniles. YFS obtained nonsecure custody of the children and placed them in a foster home. An adjudication hearing was conducted on 18 September 2013, and respondent stipulated to a number of facts. Based on those stipulations, the trial court adjudicated the children as neglected and dependent.

Prior to the dispositional phase of the hearing, Mr. Outing, represented by counsel, moved to intervene in the case. Mr. Outing stated that James had lived with him "on and off" since birth and "exclusively . . . from approximately June 2011 until June 17, 2013." According to Mr. Outing, he had served as James's primary caretaker for two years, during which he provided James with a bedroom, food, clothing, shoes, and other necessities; took him to and from preschool each day; tucked him into bed each night; and cared for him when he was sick. Mr. Outing explained that when he left town to travel for work in June 2013, he left James in respondent's care. However, when he returned home approximately one month later, he was informed that James and his half-siblings were in YFS custody.

The trial court granted Mr. Outing's motion to intervene and proceeded to disposition. The children were ordered to remain in YFS custody, and respondent was awarded supervised visitation. The court ordered YFS to conduct a home study of Mr. Outing's residence and to explore and develop a case plan with him. The court awarded Mr. Outing weekly supervised visitation with James and gave YFS "discretion to expand visitations."

Respondent returned to her mother's residence, and she and her boyfriend continued to have issues with domestic violence. Respondent made inconsistent progress with her case plan, making incomplete attempts at substance abuse treatment and sporadically testing positive for various drugs; spending time in jail on a variety of criminal charges; complying inconsistently with court-approved visitation and safety plans; and cycling through multiple jobs and living arrangements. James

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continued to have visitation with Mr. Outing during this timeframe, except for a few periods when visitation was briefly suspended. With the trial court's permission, on 15 June 2015, YFS officially placed James in Mr. Outing's residence full-time.

On 19 April 2016, the trial court entered an order requiring respondent, Mr. Outing, and YFS to schedule a meeting to discuss guardianship of James. Respondent failed to attend that meeting due to a work conflict. Following the next permanency planning hearing, on 9 May 2016, the court entered an order concluding, *inter alia*, that guardianship was in James's best interest and awarding guardianship to Mr. Outing.<sup>3</sup> Respondent appeals.<sup>4</sup>

## II. Analysis

## A. Respondent's Constitutional Rights

[1] Respondent first argues that the trial court violated her constitutional rights by concluding that guardianship was in James's best interest without making findings that respondent was unfit or acted in a manner inconsistent with her constitutionally protected status. We disagree.

Respondent is correct that the Due Process Clause protects a "parent's paramount constitutional right to custody and control of his or her children[,]" and that "the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody, or where the parent's conduct is inconsistent with his or her constitutionally protected status[.]" *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (citations omitted). "While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (citation omitted). Thus, in order "to apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's

<sup>3</sup>. The order also addressed the status of James's half-siblings. However, respondent's appeal only pertains to the portion of the order granting guardianship of James to Mr. Outing.

<sup>4.</sup> On 16 May 2016, the trial court amended its 9 May 2016 order to schedule the next hearing for 6 July 2016; all other terms of the original order remain unchanged. On 8 June 2016, respondent entered notice of appeal from the original order. To the extent that respondent should have appealed from the amended order, we construe respondent's appeal as a petition for writ of certiorari and proceed to its merits. See N.C.R. App. P. 2, 21.

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constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) (citations omitted).

However, respondent did not raise this issue during any portion of the permanency planning hearing. This Court has previously held that a parent's right to a determination of his or her constitutionally protected status is waived if the parent does not raise the issue before the trial court. See In re T.P., 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011) (declining review of the respondent-mother's argument that the trial court erred in applying the best interest standard because "constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal" (internal quotation marks, brackets, and citation omitted)). Consequently, respondent has failed to preserve this issue, and her argument is overruled.

## B. Guardianship

## 1. Best Interest of James

[2] Respondent next contends that the trial court erred by concluding that guardianship was in James's best interest. We disagree.

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citation omitted). "We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re J.H.*, \_\_ N.C. App. \_\_, \_\_, 780 S.E.2d 228, 238 (2015) (citation and internal quotation marks omitted).

Respondent contends that the trial court's conclusion that guardianship was in James's best interest is not supported by its findings that respondent was "not acting in a manner inconsistent with the health or safety of the juveniles" and was

now making progress under her [Family Services Agreement]. [Respondent] looks clean, has continued to attend her visitation, and remains employed. [Respondent] is in a much better place than she was in the Fall. [Domestic violence] has not been addressed yet but there have been no further incidences. There were issues with [respondent] and [the juveniles' maternal grandmother]. [Respondent] continues to look for alternative housing. She recently had a car accident and is attempting to get a new vehicle.

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Respondent asserts that these findings cannot be reconciled with the trial court's conclusion; however, the court's findings cannot be considered in isolation. The trial court also found that respondent's children had been in YFS custody for nearly three years, and that James had been placed with Mr. Outing for ten months "and has a good relationship" with him. Even considering respondent's recent progress, the court found that it was still "not possible for [James] to be returned home immediately or within 6 months nor [wa]s it in [his] best interest to return home because: [t]he parents have failed to alleviate the issues that necessitated placement." The court further found that at this time, James's "return to [his] home is contrary to [his] health and safety." Although respondent claims that these findings were not supported by competent evidence, they were wholly consistent with the social worker's testimony at the permanency planning hearing:

Q And would you say that based on everything that you know in this case that it's not foreseeable for these children to be placed with [respondent] within the next six months?

A Yes.

Q Why is that?

A Well, we actually want to see, you know, more progress in her case plan. Although, you know, she's done well, you know, she's come along, we want her as far as getting housing, stable housing, as well as completing the NOVA program.

Respondent had not completed the NOVA program. This program was meant to address respondent's domestic violence issues, which not only were the initial grounds for removing respondent's children from her care but also remained unresolved nearly three years later. The evidence presented by the social worker was sufficient to support the challenged findings, which in turn support the trial court's conclusion. Therefore, contrary to respondent's argument, the findings regarding her progress do not contradict the findings that it was not in James's best interest to return home, but instead reflect that the trial court considered her progress in making its ultimate determination.

Considering the totality of the court's findings, we hold that the trial court did not abuse its discretion in concluding that guardianship was in James's best interest. This argument is overruled.

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## 2. Verification of Mr. Outing's Resources

[3] Finally, respondent argues that the trial court failed to verify that Mr. Outing had "adequate financial resources" before appointing him as guardian to James. We disagree.

Before placing a juvenile in a guardianship, the trial court must verify that the proposed guardian "understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-600(c) (2015); see also N.C. Gen. Stat. § 7B-906.1(j). "The court may consider any evidence, including hearsay evidence . . . , or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-906.1(c). "[T]he trial court need not make any specific findings in order to make the verification under these statutory provisions[, b]ut the record must contain competent evidence of the guardians' financial resources and their awareness of their legal obligations." In re J.H., \_\_ N.C. App. at \_\_, 780 S.E.2d at 240 (internal quotation marks and citations omitted) (holding that verification was insufficient where the guardian-grandparents did not testify at the hearing and the only evidence of their financial resources was (1) a DSS report stating that they had been "meeting [the child's] medical needs"; and (2) a guardian ad litem report stating that the child had "no current financial or material needs"); see also In re P.A., \_\_\_ N.C. App. \_\_\_, 772 S.E.2d 240, 246 (2015) (explaining that "some evidence of the guardian's 'resources' is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence").

In the instant case, the trial court found that Mr. Outing "stands ready and able to accept the guardianship of [James]. [He] understands the legal significance of the appointment and has adequate resources to care appropriately for [James]." Prior to naming him guardian, the court discussed the significance of the appointment with Mr. Outing:

THE COURT: In regards to guardianship, Mr. Outing, . . . you understand that if I appoint or if I give you guardianship of [James] the big thing is, in essence, you're going to be mainly the one financially responsible for [him]. Do you understand that?

MR. OUTING: Yes.

THE COURT: Okay. And you're willing to accept that responsibility as far as the main financial provider for the child?

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MR. OUTING: Yes.

THE COURT: Do you also understand that if I appoint giving you guardianship you would have care, custody and control of the juvenile and may arrange for a suitable placement for the juvenile. Do you understand that?

MR. OUTING: Yes.

THE COURT: Do you also understand that you may represent the juvenile in legal actions before any court?

MR. OUTING: Yes.

THE COURT: All right. Do you also understand that you may consent to certain actions on the part of the juvenile in place of the parent or custodian including marriage, enlistment in the armed forces and/or enrollment in school?

MR. OUTING: Yes.

THE COURT: Do you also understand that you may consent to any necessary remedial psychological, medical or surgical treatment for the juvenile?

MR. OUTING: Yes.

. .

THE COURT: All right. I think the other orders continue to demonstrate as far as Mr. Outing's care of [James] in the past ten months that I think it's in the best interest of [James] that guardianship be awarded to Mr. Outing.

This colloquy, standing alone, is insufficient to meet the statutory verification requirement. "No doubt, had the trial court asked respondent the same question[s], she also would have said 'yes,' but her answer[s] alone would not have been sufficient evidence of her actual resources or abilities to care for [James] either." *Id.* at \_\_\_, 772 S.E.2d at 248.

Notably, however, the trial court also considered reports from YFS and the guardian *ad litem*, which establish that Mr. Outing provides James with a stable, YFS-approved home where James has his own bedroom, toys, and a TV. James "appears to be happy and safe" there, and he has "responded positively" to the "structure and consistency" that Mr. Outing provides. Since moving in with Mr. Outing, James's prior behavioral issues have decreased, and he has transitioned in to a normal public school. Mr. Outing takes James to all of his many medical, dental, and

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therapy appointments. In the future, he plans to enroll James in "some sporting activities outside of the home." See In re J.E., B.E., 182 N.C. App. 612, 617, 643 S.E.2d 70, 73 (concluding that verification was sufficient where the trial court considered a DSS home study reporting, inter alia, that the guardian-grandparents were "aware of the importance of structure and consistency in a child's life" and were "financially capable of providing for the needs of their grandson"), disc. review denied, 361 N.C. 427, 648 S.E.2d 504-05 (2007).

Respondent contends that "the record . . . raises serious doubts as to whether Mr. Outing has adequate resources to serve as guardian" because he was laid off for a short time around March 2016, prior to the appointment. Nevertheless, in her court report for the 19 April 2016 hearing, the guardian *ad litem* stated that she believed that Mr. Outing "is now working with a moving company." Moreover, in seeking benefits from Temporary Assistance for Needy Families during his brief period of unemployment, Mr. Outing demonstrated that he appreciated the financial burden of caring for James and wanted to prepare for it.

Furthermore, at the adjudication and disposition hearing on 18 September 2013, Mr. Outing presented evidence that he had been James's primary caretaker for approximately two years before YFS obtained custody of him while Mr. Outing was temporarily away for work. From June 2011 to June 2013, Mr. Outing alone consistently provided James with food, clothing, and other necessities. The trial court incorporated Mr. Outing's motion to intervene and the corresponding order into the findings of its dispositional order.

We have held that "a trial court may take judicial notice of earlier proceedings in the same cause and that it is not necessary for either party to offer the file into evidence" in order to do so. *In re M.N.C.*, 176 N.C. App. 114, 120, 625 S.E.2d 627, 632 (2006) (citation, brackets, and internal quotation marks omitted). Here, the trial court did not expressly indicate that it was taking judicial notice of prior orders entered in the cause. While "the better practice would be to explicitly . . . announc[e] in open court that it is taking judicial notice of the matters contained in the court file[,]" the court was not required to give such notice. *Id.* at 121, 625 S.E.2d at 632.

"The trial court has the responsibility to make an independent determination, based upon facts in the particular case, that the resources available to the potential guardian are in fact 'adequate.' " *In re P.A.*, \_\_ N.C. App. at \_\_, 772 S.E.2d at 248 (citation and brackets omitted). Considering Mr. Outing's long, close relationship with James; his

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willingness to intervene in the proceedings; and the undisputed evidence of his demonstrated ability to fully provide for his grandson, we are satisfied with the court's determination in this case. The trial court's permanency planning order is affirmed.

AFFIRMED.

Judges INMAN and ZACHARY concur.

KEY RISK INSURANCE COMPANY, PLAINTIFF
v.
CHAD PECK, DEFENDANT/THIRD-PARTY PLAINTIFF
v.
MARK ANDREW McGUIRE, THIRD-PARTY DEFENDANT

No. COA16-872 Filed 7 March 2017

# Jurisdiction—standing—insurance company action in own name—workers' compensation benefits—third party defendants

The trial court did not err in a negligence action seeking to recover workers' compensation benefits by granting defendant third party's motion to dismiss based on lack of standing. Plaintiff insurance company did not possess a statutory right to institute the action in its own name against defendant under N.C.G.S. § 97-10.2. Further, plaintiff failed to show the trial court abused its discretion by denying plaintiff's motion to substitute a party.

Appeal by plaintiff from orders entered 25 April 2016 by Judge W. Allen Cobb in Craven County Superior Court. Heard in the Court of Appeals 6 February 2017.

Macrae, Perry, Macrae & Whitley, LLP, by Gregory T. Whitley, for plaintiff-appellant.

Ennis, Baynard, Morton, Medlin & Brown P.A., by Stephen C. Baynard, for defendant-appellee Peck.

TYSON, Judge.

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Key Risk Insurance Company ("Key Risk") appeals from orders entered granting Chad Peck's ("Defendant") motion to dismiss and denying Key Risk's motion to substitute a party. We affirm.

## I. Factual Background

Judith Holliday ("Holliday") was employed at CarolinaEast Medical Center, Inc. ("CarolinaEast"). Key Risk provided workers' compensation insurance to CarolinaEast.

On 3 February 2013, Holliday and Third-Party Defendant, Mark Andrew McGuire ("McGuire"), responded to an emergency call. McGuire drove the ambulance, while Holliday was seated in the front passenger seat. Key Risk alleged the ambulance approached an intersection with its emergency lights and sirens activated while en route. Key Risk further alleged Defendant failed to yield, entered the intersection, and collided with the ambulance.

Holliday and Defendant received and alleged injuries resulting from the collision. Defendant signed a "Property Damage Release" releasing CarolinaEast, McGuire, and American Alternative Insurance Corporation from further liability for the collision in exchange for payment of \$5,724.56. Defendant also signed a "Release in Full" wherein he released CarolinaEast, McGuire, Glatfelter Claims Management, Inc., and American Alternative Insurance Corporation from further liability for the collision in exchange for payment of \$4,143.45 for his bodily injuries.

Holliday received extensive medical care for her injuries. Key Risk's complaint alleged it paid Holliday \$63,965.58 as CarolinaEast's provider of workers' compensation insurance. Key Risk's complaint further alleged it filed the proper forms with the North Carolina Industrial Commission, which admitted Holliday's right to compensation for medical treatment for the injuries she had sustained in the collision.

On 3 December 2015, Key Risk filed its complaint. Key Risk alleged Defendant was negligent in the operation of his vehicle, and it was entitled to recover the workers' compensation benefits paid to Holliday from Defendant. Defendant filed an answer and a third-party complaint against McGuire. McGuire filed an answer and a motion for judgment on the pleadings.

Defendant moved to dismiss the action on 29 March 2016 pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 13 April 2016, Key Risk moved to substitute Holliday as the named plaintiff pursuant to N.C. Gen. Stat. § 97-10.2.

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After hearing oral arguments of counsel and reviewing the submissions of the parties, the trial court denied McGuire's motion for judgment on the pleadings, denied Key Risk's motion to substitute a party, and granted Defendant's motion to dismiss. Key Risk appeals.

## II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat.  $\S$  7A-27(b) (2015).

## III. Issues

Key Risk argues the trial court erred by granting the motion to dismiss for lack of standing. In the alternative, Key Risk argues, even if it did not have standing to bring the claim, the trial court abused its discretion by denying its motion to substitute a party.

## IV. Standard of Review

"A motion to dismiss a party's claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure." *Slaughter v. Swicegood*, 162 N.C. App. 457, 464, 591 S.E.2d 577, 582 (2004).

When considering a motion to dismiss under Rule 12(b)(6), "[t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)). The allegations in the complaint must be viewed in the light most favorable to the non-moving party. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994).

A trial court's order denying a motion to substitute a party is reviewed for an abuse of discretion. *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 227 N.C. App. 102, 112, 744 S.E.2d 130, 137 (2013) (holding the trial court did not abuse its discretion in denying a motion to substitute where plaintiffs failed to offer any compelling reason why they failed to make the motion in a reasonable time after a merger). "Under the abuse-of-discretion standard, we . . . determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Mark Grp. Int'l., Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002).

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## V. Insurers' Rights under N.C. Gen. Stat. § 97-10.2

Key Risk reads and asserts the provisions of N.C. Gen. Stat. § 97-10.2 (2015) provide standing to bring this action. We disagree.

When our courts engage in statutory interpretation, the primary task "is to ensure that the legislative intent is accomplished. The best indicia of legislative purpose are the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 88-89, 484 S.E.2d 566, 569 (1997) (internal citations and quotation marks omitted).

Statutory interpretation begins by examining the plain and ordinary meanings of words in the statute. *Dion v. Batten*, \_\_ N.C. App. \_\_, 790 S.E.2d 844, 848 (2016). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988); *see also State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967) ("It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise.").

N.C. Gen. Stat. § 97-10.2 exclusively provides for the rights and remedies of employees, employers, and insurance carriers against third parties under the Workers' Compensation Act. *Radzisz*, 346 N.C. at 86, 484 S.E.2d at 568. N.C. Gen. Stat. § 97-10.2(a) states:

The respective rights and interests of the employeebeneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered *shall be as set forth in this section*.

## N.C. Gen. Stat. § 97-10.2(a) (emphasis supplied).

Under this statute, the employee possesses the exclusive right to proceed against a third-party tortfeasor during the first twelve months after the date of injury. N.C. Gen. Stat. § 97-10.2(b). If the employee does not bring such an action within those first twelve months, and the employer has filed the appropriate admission of liability with the Industrial Commission, "then either the employee or the employer shall have the right to proceed to enforce the liability of the third party by appropriate proceedings." N.C. Gen. Stat. § 97-10.2(c) (emphasis supplied). If neither the employee nor the employer have instituted an action against the third-party tortfeasor prior to sixty days before the

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expiration of the applicable statute of limitations, the right to bring the action reverts exclusively to the employee. *Id.* 

When a proceeding is instituted against a third party, "the person having the right" to bring the proceeding must bring it "in the name of the employee or his personal representative[.]" N.C. Gen. Stat. § 97-10.2(d). An exception to this requirement exists where the employee or his personal representative "refuse[s] to cooperate with the employer by being the party plaintiff[.]" *Id.* In these cases, the statute states the action "shall be brought *in the name of the employer* and the employee or his personal representative shall be made a party plaintiff or party defendant by order of court." *Id.* (emphasis supplied). In any properly instituted proceeding, neither the employer nor the insurance carrier are considered necessary or proper parties. *Id.* 

After outlining which parties are permitted to institute proceedings within the applicable time periods against a third party, N.C. Gen. Stat. § 97-10.2(g) specifically provides for the rights of the insurance carrier:

The insurance carrier affording coverage to the employer under this Chapter shall be subrogated to all rights and liabilities of the employer hereunder but this shall not be construed as conferring any other or further rights upon such insurance carrier than those herein conferred upon the employer, anything in the policy of insurance to the contrary notwithstanding.

Here, Key Risk argues the statute grants insurance carriers subrogation to all the rights and liabilities of the employer, and as such insurance carriers have standing under the statute to enforce the liability of the third party. The plain language of N.C. Gen. Stat. § 97-10.2(b)-(d) does not support this reading. *See Lemons*, 322 N.C. at 276, 367 S.E.2d at 658.

The language of these sections explicitly states "the employer shall have the right to proceed to enforce the liability of the third party." N.C. Gen. Stat. § 97-10.2(c) (emphasis supplied). The insurance carrier is only mentioned once in the sections outlining the procedure for bringing an action against a third party. The statute provides that when a proceeding is brought against a third party "by the person having the right" to bring such a proceeding, "the insurance carrier shall not be a necessary or proper party thereto." N.C. Gen. Stat. § 97-10.2(d). The next sentence states where an employee refuses to cooperate, "the action *shall* be brought *in the name of the employer*." *Id.* (emphasis supplied). Based upon the plain language of the statute, an insurance carrier does not

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have the right to bring an action against a third party in its own name, if the employee refuses to cooperate.

## VI. Legislative History

A review of the legislative history also supports this reading of the statute. Before the statute was re-codified and amended in 1959, prior versions of N.C. Gen. Stat. §97-10 provided:

The employer *or his carrier* shall have the exclusive right to commence an action in his own name and/or in the name of the injured employee or his personal representative for damages on account of such injury or death[.]

N.C. Gen. Stat. § 97-10 (1943), as amended by N.C. Gen. Stat. § 97-10.2 (2015).

The paragraph on the insurance carrier's subrogation rights stated:

When any employer is insured against liability for compensation with any insurance carrier, . . . , it shall be subrogated to all rights and duties of the employer, and may enforce any such rights in the name of the injured employee or his personal representative; but nothing herein shall be construed as conferring upon the insurance carrier any other or further rights than those existing in the employer[.]

*Id.* When the statute was re-codified and amended as N.C. Gen. Stat.  $\S$  97-10.2 in 1959, all references to an insurance carrier's right to bring a direct suit against a third party in its own name or in the name of the employee were removed. N.C. Gen. Stat.  $\S$  97-10.2(c) & (g) (1959).

Based upon the plain language of the statute and the legislative history, nothing shows the General Assembly intended to provide the insurance carrier with the right to bring a direct action against a third party. See Radzisz, 346 N.C. at 86, 484 S.E.2d at 568. The trial court did not err in concluding that Key Risk did not have standing to bring this action and dismissing the action. The trial court's ruling is affirmed.

## VII. Motion To Substitute

Key Risk argues, even if it lacked statutory standing, the trial court abused its discretion and should have allowed its motion to substitute a party brought pursuant to N.C. Gen. Stat. § 97-10.2. Key Risk further argues it would have been proper to allow the motion to substitute a party under Rule 17(a) of the North Carolina Rules of Civil Procedure.

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## A. N.C. Gen. Stat. § 97-10.2(d)

Key Risk first argued "[p]ursuant to N.C.G.S. § 97-10.2(d) [Key Risk] is entitled to an order from the Court directing that Judith Holliday be made the party-plaintiff in this action."

N.C. Gen. Stat. § 97-10.2(d) only allows for substitution of an employee as the named plaintiff where the employee or his personal representative "refuse[s] to cooperate" and the action is "brought in the name of the employer."

Here, the action was brought solely in the insurance carrier's name and not the employer's name. Furthermore, no indication in the record shows the employee refused to cooperate. Key Risk acknowledged both in its motion to substitute and in its arguments to the trial court that "[a]t the time of initiation of this action, [Key Risk] and its counsel had not had the opportunity to speak with Ms. Holliday concerning the action and had thus not secured her consent to cooperate and participate in the action." On this record, Key Risk has failed to show the trial court abused its discretion in denying the motion under N.C. Gen. Stat. § 97-10.2(d).

## B. Rule 17(a)

At the trial court's hearing on the motions, Key Risk also argued it would be proper to allow the motion to substitute a party under Rule 17(a) of the North Carolina Rules of Civil Procedure.

Rule 17(a) provides:

Real party in interest. — Every claim shall be prosecuted in the name of the real party in interest . . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

## N.C. Gen. Stat. § 1A-1, Rule 17(a) (2015).

"A real party in interest is a party who is benefited or injured by the judgment in the case and who by substantive law has the legal right to enforce the claim in question." *Slaughter*, 162 N.C. App. at 463, 591 S.E.2d at 582 (citation and quotation marks omitted). As held *supra*, an insurance carrier does not have a statutory right to bring a direct suit

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to enforce a claim against a third party under N.C. Gen. Stat. § 97-10.2. Where a case is not brought by the real party in interest, it is within the discretion of the trial court to allow a motion to substitute under Rule 17(a). *Revolutionary Concepts*, *Inc.*, 227 N.C. App. at 112, 744 S.E.2d at 137.

N.C. Gen. Stat. § 97-10.2(b)-(d) sets out the procedures regarding who can bring a claim against a third party and when those claims can be instituted under the Workers' Compensation Act. Key Risk did not follow these statutory requirements to properly bring or assert the claim against Defendant.

Key Risk was aware that the statutory right to bring a claim would revert exclusively to the employee sixty days prior to the expiration of the statute of limitations, and admitted to the trial court that "this thing was put together last minute." Key Risk failed to speak to the employee prior to bringing this action. The record indicates Key Risk did not secure the employee's consent to being named party plaintiff until 13 April 2016, several months after the case had been filed and after the statute of limitations had expired.

Based on the facts of this case, Key Risk has failed to show the trial court abused its discretion by denying its motion to substitute a party.

## VIII. Conclusion

Key Risk does not possess a statutory right to institute this action in its own name against Defendant under N.C. Gen. Stat. § 97-10.2. Key Risk has failed to show the trial court abused its discretion by denying its motion to substitute a party. The trial court's orders denying Key Risk's motion to substitute a party are affirmed and granting Defendant's motion to dismiss. *It is so ordered*.

#### AFFIRMED.

Chief Judge McGEE and Judge STROUD concur.

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TOM KRAUSE, PLAINTIFF
v.
RK MOTORS, LLC AND WESTERN SURETY COMPANY, DEFENDANTS

No. COA16-911 Filed 7 March 2017

## Appeal and Error—interlocutory orders and appeals—counterclaim unresolved—no certification or substantial right

Although plaintiff contended that the trial court erred in a fraud, unfair and deceptive trade practices, negligent misrepresentation, and breach of express warranty case by granting defendants' motion for summary judgment, the case was dismissed for lack of subject matter jurisdiction. The trial court's order failed to acknowledge or resolve defendant RK Motors' counterclaim. Further, the order contained no Rule 54(b) certification, and the briefs failed to make any argument of a substantial right.

Appeal by plaintiff from order entered 7 June 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 February 2017.

Blossom Law PLLC, by Rashad Blossom, and The Law Offices of Jason E. Taylor, by Lawrence B. Serbin, for plaintiff-appellant.

Johnston, Allison & Hord, P.A., by Scott R. Miller and Martin L. White, for defendants-appellees.

MURPHY, Judge.

Plaintiff Tom Krause ("Krause") appeals from the trial court's order granting RK Motors, LLC ("RK Motors") and Western Surety Company's (collectively "Defendants") motion for summary judgment. Specifically, he contends the trial court erred in granting Defendants' motion as the motion failed to state with particularity its bases, and in making findings of controverted fact and conclusions of law in its order. Further, Krause argues that the trial court's grant of summary judgment in Defendants' favor as to his claims for fraud, unfair and deceptive trade practices, negligent misrepresentation, and breach of express warranty were unsupported by law.

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RK Motors' counterclaim for unfair and deceptive trade practices remains before the trial court. Additionally, the trial court's order granting summary judgment retained jurisdiction over the case "for such other and further orders as may be necessary and appropriate including, but not limited, to orders for the award of attorneys' fees and recovery of costs." On these bases, the present appeal is interlocutory. Neither party has argued why this case is properly before us despite its interlocutory nature, and it is not the role of this Court to create an appeal for an appellant. Accordingly, we dismiss the appeal for lack of subject matter jurisdiction.

## **Factual Background**

Krause, a citizen and resident of California, was in the market to purchase a restored vintage performance automobile when he came across RK Motors' online listing for a 1967 Chevrolet Nova (the "Nova"). RK Motors is a North Carolina limited liability company located in Charlotte that holds itself out as a dealer of antique, collectible, and customized cars. Its website states that all cars in its showroom earn "the RKM Performance Center Seal of Approval, a comprehensive 70+ point inspection performed by one of [the company's] ASE certified technicians where any major issues are found and addressed."

The listing described the Nova and also displayed several pictures as well as a video of the car. As alleged in Krause's complaint, between its posting and communications with him, RK Motors represented that the Nova: Had 137 miles on it; contained a 383 cubic inch small block V8 supercharged engine with 540 horsepower designed "to go straight at a very high rate of speed"; was professionally assembled and restored; would be an excellent car for someone looking for sheer performance; could be driven and enjoyed; was a "pavement-scorcher" with a six-figure build cost after months of skilled workmanship and hours of thorough detailing in accordance with exacting specifications; had a no-compromises, impressive drivetrain with momentum that perfectly complemented solid, undercoated floor plans and a long roster of serious speed equipment; included a transmission that executed "quick, efficient shifts on the heels of wheel stand-inducing launches"; was "fully sorted and ready to pound the pavement"; and was "ready to hit the road for Friday night cruises, Saturday morning poker runs or Sunday afternoon shows." The listing also reassured that RK Motors was a company of car enthusiasts who "know the kind of dedication a high dollar project takes."

Krause first contacted RK Motors regarding the Nova on 16 August 2013, and he was informed that there was a pending sale of the car. Unbeknownst to Krause, when the other buyer arrived to pick up the

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Nova, it ran poorly, overheated, and was spewing radiator fluid after being driven only one-eighth of a mile. That buyer rescinded the contract to purchase the Nova on the spot.

Approximately one month later, Krause revisited the website and noticed the listing was still posted and the "pending sale" note had been removed. On 15 September 2013, Krause emailed Frank Carroll ("Carroll"), RK Motors' Vice President of Sales, and was told the earlier buyer's "wife had nixed the deal." Later, however, Carroll's story changed, and he reported that the previous buyer had "a bad record" with the bank, making it difficult for him to get insurance for a classic car. This change likely resulted from Carroll's tendency to, as he put it, "ma[k]e up something" when asked why a deal fell through.

Krause asked Dave Kindig ("Kindig"), a professional car builder, to review the listing and then contacted Carroll to ask a few questions about the Nova. Krause explained that he and Kindig had noticed the Nova had a crack in its lower-left-rear panel above the exhaust pipe, and he wanted to know what had caused the crack and whether it had been repaired. Carroll replied "that the [Nova]'s horsepower caused vibration that might have caused the crack," but the crack "had been repaired."

On 16 September 2013, RK Motors emailed Krause a number of documents pertaining to the proposed sale of the Nova, including a Bill of Sale and Odometer Disclosure Statement, both signed by the company's president. That paperwork reiterated that there were 137 miles on the Nova. Based on RK Motors' advertisement, photographs, video, emails, verbal representations, Bill of Sale, and Odometer Disclosure Statement, Krause was induced to enter into the contract to purchase the Nova. He paid \$67,000.00 to RK Motors in the form of a \$1,000.00 down payment on 16 September, and wire transfers to RK Motors of \$35,000.00 on 17 September and \$31,000.00 on 1 October.

According to RK Motors' records, the company knew no later than 30 August 2013 that the Nova was running poorly and that "above half throttle . . . it spits and sputters and almost cuts off[,]" yet RK Motors concealed these facts from Krause and made false representations to him via email as to the condition of the Nova. On 17 September 2013, RK Motors wrote that "[t]he shop is going through the car and making sure it is running well. Giving it a tune up and checking things out. Everything looks good."

On 4 October 2013, Exotic Car Transport, Inc. picked up the Nova from RK Motors and transported it to Krause. Krause's first opportunity to inspect the Nova was 10 October 2013 when he took actual

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possession of the vehicle. Immediately upon taking possession of the Nova, Krause experienced problems with the car. The Nova idled too low and overheated after driving about three miles. Krause took the Nova to a mechanic who attributed the overheating to a broken cooling fan toggle switch. The same mechanic repaired the switch and adjusted the Nova's idle, returning it to Krause the same day. However, when Krause attempted to drive the Nova, he experienced severe vibration and the belt for the supercharger and harmonic balancer fell off. On 12 October 2013, Krause had the Nova towed back to the mechanic.

This time, according to Krause, the mechanic discovered a bolt missing at the end of the harmonic balancer, a damaged crankshaft and supercharger, cracked cylinder heads, loose suspension bolts, a crushed front-right brake line, and a damaged transmission. In addition, the crack in the Nova's lower-left-rear panel, that Carroll reported had been fixed, still existed, and there was a similar crack in the lower-right-rear panel, as well. Upon further inspection by his mechanic, Krause learned that the Nova did not contain a professionally built 383 cubic inch small block engine, but rather a 350 Chevy stock engine with approximately 80,000 miles on it. On 15 October 2013, RK Motors sent him a Dealer's Reassignment of Title to a Motor Vehicle in which the company disclosed for the first time that the odometer reading of 137 miles did not reflect the actual mileage.

On 4 May 2015, Krause filed a complaint in Mecklenburg County Superior Court against RK Motors and the company's surety, Western Surety Company, asserting causes of action against RK Motors for (1) actual fraud/constructive fraud; (2) unfair and deceptive trade practices; (3) violation of the North Carolina Vehicle Mileage Act; (4) gross negligent misrepresentation/negligent misrepresentation; and (5) breach of express warranty. Krause also asserted as the sixth count his right to recover from either RK Motors or Western Surety Company pursuant to N.C.G.S. § 20-288(e). Put simply, Krause alleged that he relied on RK Motors' false representations in deciding to purchase the Nova and that he could not have reasonably discovered the true condition of the Nova before purchasing it.

Defendants filed a motion to dismiss on 19 August 2015. After a hearing, the trial court granted Defendants' motion to dismiss Krause's cause of action for violation of the North Carolina Vehicle Mileage Act, but denied their motion to dismiss the remaining claims. On 10 November 2015, Defendants filed an answer, twenty-six affirmative defenses, and a counterclaim. Defendants contended that RK Motors' website specifically disclaims all warranties and noted that information contained

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thereon might be out of date or erroneous. Defendants also relied upon the fact that Krause executed a Buyer's Guide and Disclaimer of Warranties and Liability as part of the purchase. The Buyer's Guide stated that Krause agreed to buy the Nova "as is-no warranty," and that "dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle." The Disclaimer of Warranties and Liability also stated in pertinent part:

Customer acknowledges and agrees that once any third party carrier secures the purchased Vehicle from RK Motors, Customer and/or such carrier bear all risk of loss if the Vehicle is lost, stolen, destroyed, or damaged in any way while in possession of such carrier and RK Motors has no risk of loss whatsoever under such circumstances.

- 4. Customer has had an opportunity to inspect and examine the Vehicle as fully as he/she desires, and, as such, the Vehicle is being sold by RK Motors to Customer in "as-is" condition, with all faults.
- 5. RK Motors makes no warranties whatsoever, whether express or implied, of merchantability, fitness for purpose, or otherwise, with respect to the Vehicle, and Customer hereby disclaims and waives all such warranties.

Prior to purchasing the Vehicle, Customer acknowledges that he/she has read and understands the above limitations and disclaimers, that they are terms and conditions of sale and that they constitute the entire agreement between the parties regarding warranties and any other liability.

Based on this language, Defendants alleged that Krause waived any right to recover for any of the false statements made to him.

Krause replied to RK Motors' counterclaim on 16 March 2016, and on 23 March 2016 Defendants filed a motion for summary judgment as to "all claims." Defendants amended their motion for summary judgment on 6 May 2016 to limit it to "all of Plaintiff's claims." At no time did Krause file a cross-motion for summary judgment.

On 7 June 2016, the trial court granted Defendants' motion for summary judgment on Krause's remaining claims. Notably, the order granting summary judgment failed to acknowledge or resolve RK Motors' counterclaim. It did explain, however, "[t]his cause is retained for such other and further orders as may be necessary and appropriate including, but not limited, to orders for the award of attorneys' fees and recovery of

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costs." Krause gave notice of appeal from the order granting Defendants' motion for summary judgment on 30 June 2016.

## Analysis

At the outset, we note that the record establishes that the counterclaim has not been resolved and that the trial court has not relinquished jurisdiction. Accordingly, this appeal is interlocutory. *See Veazey v. City* of *Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citation omitted)).

A party may immediately appeal an interlocutory order or judgment only if (1) the trial court certifies the case for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, or (2) if the trial court's decision deprives the appellant of a substantial right that would be lost absent immediate review. Branch Banking & Tr. Co. v. Peacock Farm, Inc., \_\_\_\_ N.C. App. \_\_\_\_, \_\_\_\_, 772 S.E.2d 495, 498, aff'd per curiam, 368 N.C. 478, 780 S.E.2d 553 (2015). Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure requires appellants to include a "statement of the grounds for appellate review." If the appeal is interlocutory, that statement must show that the trial court certified the case for immediate review, or "contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4).

Here, Krause's brief fails to contain the requisite statement of the grounds for appellate review. Furthermore, he declines to address the interlocutory nature of the appeal in the remainder of his brief. The order granting summary judgment in favor of Defendants contains no Rule 54(b) certification, and the briefs to this Court fail to make any argument as to why the order affects a substantial right.

"It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994); *see also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."). That burden rests solely with the appellant. *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. Accordingly, we are required to dismiss this appeal.

DISMISSED.

Chief Judge McGEE and Judge DAVIS concur.

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 $\begin{array}{c} {\rm ROBERT~MURRAY,~Plaintiff} \\ {\rm v.} \\ {\rm JOSEPH~CLIFTON~MOODY,~Defendant} \end{array}$ 

No. COA16-763 Filed 7 March 2017

## Jurisdiction—superior court—workers' compensation lien—subrogation lien—automobile accident

The superior court erred in a personal injury case arising out of an automobile accident by denying defendant Moody's motion to determine the amount of unnamed defendants' workers' compensation lien. When an injured employee is entitled to compensation from a third-party judgment or settlement, N.C.G.S. § 97-10.2(j) grants the superior court limited jurisdiction to determine the amount of an employer's or workers' compensation carrier's subrogation lien.

Appeal by defendant from order entered 31 March 2016 by Judge Reuben F. Young in Wilson County Superior Court. Heard in the Court of Appeals 29 November 2016.

Cranfill Sumner & Hartzog LLP, by Scott H. Dunnagan, for unnamed workers' compensation defendants-appellees.

Law Office of Robert E. Ruegger, by Robert E. Ruegger, for defendant-appellant.

ZACHARY, Judge.

Pursuant to the North Carolina Workers' Compensation Act, an employer and its workers' compensation carrier are entitled to a lien on an injured employee's recovery in an action against a third-party tort-feasor. This lien extends to all benefits paid to an employee for injuries caused by the third party.

In this case, plaintiff Robert Murray was injured in an automobile accident in the course of his employment with unnamed defendant Evans MacTavish Agricraft, Inc. (Evans). Defendant Joseph Moody caused the accident. Evans and its workers' compensation carrier, unnamed defendant Cincinnati Insurance Company (collectively with Evans, unnamed defendants) paid medical and indemnity benefits to Murray, who later brought a personal injury action against Moody. The action was tried to a jury, which heard evidence concerning Murray's injuries and the

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amount of workers' compensation benefits that he received. The jury returned a verdict against Moody and awarded Murray money damages.

The trial judge entered a final judgment in favor of Murray that, pursuant to N.C. Gen. Stat. § 97-10.2(e), reduced the damage award by the amount of workers' compensation benefits he received from unnamed defendants. Four days later, the trial judge entered an amended judgment that did not reduce the damage award but instead specifically granted judgment in favor of Evans for the exact amount of workers' compensation benefits that were paid to Murray, and that granted judgment in favor of Murray for the balance of the damage award.

Roughly a year later, Moody filed a motion in Wilson County Superior Court pursuant to N.C. Gen. Stat. § 97-10.2(j), which allows a superior court judge, in his or her discretion, to determine the amount of an employer's lien after an injured employee has obtained a judgment against or settled a claim with a third party. The superior court entered an order denying Moody's motion, holding that the amount of unnamed defendants' lien had been determined by the prior court's amended judgment, and that the same was res judicata and could not be relitigated. As a result, the superior court concluded that it lacked jurisdiction to determine unnamed defendants' lien pursuant to subsection 97-10.2(j).

Moody now appeals the superior court's order, and he argues that the court had jurisdiction to set the amount of the lien. For the reasons that follow, we agree. Accordingly, we reverse the superior court's order denying Moody's motion and remand for further proceedings.

## I. Background

On 3 August 2010, Murray was driving on Highway 86 near Hillsborough, North Carolina, when his truck, a company vehicle owned by Evans, was struck in the rear by a car being driven by Moody. The rear impact caused Murray's truck to strike another vehicle, and Murray sustained a compensable neck injury in the accident. Murray's neck injury required extensive medical treatment, including physical and medication therapy.

Unnamed defendants accepted Murray's workers' compensation claim and paid a total of \$7,432.13 in benefits (comprised of \$5,247.23 in medical benefits and \$2,184.90 in indemnity payments). On 2 August 2013, Murray filed a personal injury action against Moody in Wilson County Superior Court. The complaint alleged that Moody negligently caused the August 2010 car accident and sought damages for Murray's pain and suffering, medical expenses, and permanent injury. The case proceeded to trial in March 2015, the Honorable Robert H. Hobgood presiding.

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At trial, the jury heard evidence of the medical and indemnity payments that Evans made to Murray due to the compensable injury he sustained in the August 2010 automobile accident. This evidence established that Murray had received a total of \$7,432.13 in workers' compensation benefits. The jury returned a verdict finding Moody to be negligent and awarding Murray damages in the amount of \$11,000.00. Consequently, on 16 March 2015, Judge Hobgood entered a final judgment consistent with the jury's verdict. Judge Hobgood then reduced Murray's recovery by the amount of workers' compensation benefits paid to Murray. The final judgment reads as follows:

And the Court having reduced said verdict by \$7,423.13, pursuant to the North Carolina Workers['] Compensation Act and in accordance with N.C.G.S. § 97-10.2;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be had against the Defendant in the amount of \$3,576.87, together with interest from the date of filing hereof and costs taxed to the Defendant herein, including reasonable attorney fees to Plaintiff's counsel pursuant to N.C.G.S. § 6-21.1.

The final judgment complied with N.C. Gen. Stat.  $\S$  97-10.2(e) (2015), which provides that

the amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff.

For reasons not apparent in the record, Judge Hobgood entered an amended final judgment (amended judgment) on 20 March 2015, which expressly provided that "judgment be had against the Defendant in the amount of \$7,423.13 in favor of Evans Mactavish Agricraft to be distributed in accordance with N.C.G.S. § 97-10.2(f)." Another portion of the amended judgment granted "judgment... in favor of [Murray] in the amount of \$3,576.87[,]" the remainder of the jury's damages award. As a result, while the sum of \$7,423.13 was simply deducted from Murray's recovery in the initial judgment, the sum of \$7,423.13 was specifically awarded to Evans in the amended judgment. Murray's damage award was unchanged by the amended judgment.

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On 14 May 2015, Moody appealed to this Court from the amended judgment and other pre- and post-trial orders entered in the negligence action. Roughly three months later, Murray and Moody entered into a settlement that was memorialized in a document entitled "Release of All Claims-Civil Action Pending" (the release). Pursuant to the release, Moody and his liability insurance carrier agreed to pay Murray the lump sum of \$15,654.25 in consideration for Murray's agreement to release any "claims resulting or to result" from the August 2010 automobile accident. However, the release expressly preserved unnamed defendants' rights "to enforce the [amended] judgment obtained in favor of [Evans] in [the negligence] action for [workers' compensation] benefits paid . . . to . . . Robert Murray for his personal injuries."

On 2 September 2015, unnamed defendants served a Notice of Appearance and Claim of Lien as well as a motion pursuant to N.C. Gen. Stat. § 97-10.2(j) seeking determination of the amount of their lien on Murray's recovery. Unnamed defendants' motion, however, was never scheduled for hearing. The record suggests that unnamed defendants did not go forward with their motion once they learned that the amended judgment setting the specific amount they could recover had been entered in the negligence action. On 10 September 2015, Moody filed a motion to withdraw his appeal from, *inter alia*, the amended judgment. This Court granted the motion to withdraw the appeal four days later.

In February 2016, Moody filed his own Motion for Determination of Workers' Compensation Lien in superior court pursuant to N.C. Gen. Stat. § 97-10.2(j). On 22 February 2016, the Honorable Reuben F. Young heard Moody's motion in Wilson County Superior Court. At the hearing, unnamed defendants argued that Judge Hobgood's amended judgment had decided the issue and amount of their lien. As such, unnamed defendants argued, the determination of the lien was res judicata and Judge Young had no statutory authority under N.C. Gen. Stat. § 97-10.2(j) to revisit the issue. On 31 March 2016, Judge Young entered an order that denied Moody's motion on the following the grounds:

[T]his Court lacks jurisdiction to determine the Workers' Compensation [Defendants'] subrogation lien under N.C.G.S. § 97-10.2(j) and the same is res judicata. This Court further finds that the Amended Final Judgment entered on March 20, 2015 in the above-captioned case remains undisturbed, specifically including, but not limited to, payment of \$7,423.13 by Defendant Joseph Clifton

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Moody to the Workers' Compensation Defendants to be distributed in accordance with N.C.G.S. § 97-10.2(f).

Moody appeals from Judge Young's order.

#### II. Discussion

## A. Standard of Review

Ordinarily, the trial court's ruling on a motion pursuant to N.C. Gen. Stat. § 97-10.2(j) is reviewed for an abuse of discretion. *Cook v. Lowe's Home Centers, Inc.*, 209 N.C. App. 364, 367, 704 S.E.2d 567, 570 (2011). However, the principal question presented here is whether Judge Young had jurisdiction to rule on the merits of Moody's motion. "[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo." Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004) (citation omitted).

## B. Analysis

Moody's sole argument on appeal is that Judge Young erred in denying Moody's motion to determine the amount of unnamed defendants' lien on the ground that the amended judgment was res judicata as to the lien issue. We agree.

"Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies[,]" and the doctrine precludes the relitigation of "all matters that were or should have been adjudicated in the prior action." Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citations omitted). For unnamed defendants to establish that Moody's claim (or motion) is barred by res judicata, they "must show (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." Erler v. Aon Risks Servs., Inc., 141 N.C. App. 312, 316, 540 S.E.2d 65, 68 (2000), disc. review denied, 548 S.E.2d 738 (2001).

It is well established that our Workers' Compensation Act was never intended to provide an employee with a windfall recovery from both the employer and a third party who is legally responsible for causing the employee's compensable injuries. *Radzisz v. Harley Davidson of Metrolina*, *Inc.*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997). Where "[t]here is one injury, [there is] still only one recovery." *Andrews v. Peters*, 55 N.C. App. 124, 131, 284 S.E.2d 748, 752 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982). To that end, N.C. Gen. Stat. § 97-10.2 defines

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the rights and remedies of employees and employers against third-party tortfeasors. *Radzisz*, 346 N.C. at 89, 484 S.E.2d at 569. "Section 97-10.2 and its statutory predecessors were designed to secure prompt, reasonable compensation for an employee and simultaneously to permit an employer who has settled with the employee to recover such amount from a third-party tort-feasor." *Id.* (citation omitted).

In the first twelve months following an injury, an injured employee has the "exclusive right" to enforce the liability of a third party. N.C. Gen. Stat. § 97-10.2(b) (2015). Pursuant to subsection 97-10.2(h) (2015), "[i]n any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest . . . upon any payment made by the third party by reason of such injury or death[.]" "An employer's statutory right to a lien on a recovery from the third-party tort-feasor is mandatory in nature[.]" *Radzisz*, 346 N.C. at 89, 484 S.E.2d at 569.

When an injured employee is entitled to compensation from a third-party judgment or settlement, N.C. Gen. Stat. § 97-10.2(j) (2015) grants the superior court limited jurisdiction to determine the amount of an employer's or workers' compensation carrier's subrogation lien:

(j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount. if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable,

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in determining the appropriate amount of the employer's lien. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division.

Pursuant to the statute's plain language, there are two instances in which the superior court is given jurisdiction: (1) when the employee has obtained a judgment against the third party, and (2) when the employee has settled with the third party.

"There is no mathematical formula or set list of factors for the trial court to consider in making its determination . . . ; the statute plainly affords the trial court discretion to determine the appropriate amount of [a] lien." Wood v. Weldon, 160 N.C. App. 697, 700, 586 S.E.2d 801, 803 (2003) (internal citation omitted), disc. rev. denied, 358 N.C. 550, 600 S.E.2d 469 (2004). The discretionary authority granted to the superior court under subsection 97-10.2(j) is rather broad, but it "is not unlimited[.]" In Re Biddix, 138 N.C. App. 500, 504, 530 S.E.2d 70, 72 (2000). Rather, "the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported . . . [by] findings of fact and conclusions of law sufficient to provide for meaningful appellate review." Id. (quoting Allen v. Rupard, 100 N.C. App. 490, 495, 397 S.E.2d 330, 333 (1990)). It is also "clear from the use of the words 'shall' and 'and' in subsection (j), that the trial court must, at a minimum, consider the factors that are expressly listed in the statute." Estate of Bullock v. C.C. Mangum Co., 188 N.C. App. 518, 526, 655 S.E.2d 869, 874 (2008).

The gravamen of Moody's argument is that the doctrine of res judicata is inapplicable here, as subsection 97-10.2(j) allows him "to challenge the amount the workers' compensation carrier is entitled to recover after a jury trial and entry of judgment" in the negligence action. "If this were not the case," Moody argues, "the ability of a party to challenge the amount of a workers' compensation lien" pursuant to subsection 97-10.2(j) would be limited "only to those situations where a pre-trial settlement was reached."

In response, unnamed defendants argue that because the "amount" of their lien was previously determined . . . by way of Judge Hobgood's Amended Final Judgment," res judicata bars the relitigiation of this matter. Unnamed defendants further argue that even if the doctrine of res judicata does not apply, "both law and equity" require remand for entry of an order consistent with the amended judgment. Unnamed defendants assert that Judge Hobgood's amended judgment secures the amount they are owed and that amount should not be disturbed. This

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contention is based on the rule that "ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972).

After carefully reviewing the decisions of this Court and our Supreme Court in  $Hieb\ v.\ Lowery$ , 121 N.C. App. 33, 464 S.E.2d 308 (1995), aff'd, 344 N.C. 403, 474 S.E.2d 323 (1996), we conclude that Moody's argument must prevail.

In *Hieb*, the plaintiff, who was gravely injured in an automobile accident and who received workers' compensation benefits from St. Paul Fire and Marine Insurance Company (St. Paul), filed an action against the third-party defendant together with unnamed defendant Hartford Accident and Indemnity Company (Hartford), the plaintiff's underinsured motorist (UIM) insurance carrier. *Hieb*, 121 N.C. App. at 34, 464 S.E.2d at 309. The personal injury action was tried to a jury, which returned a verdict against the defendants and awarded the plaintiff \$1,279,000.00 in damages. *Id.* at 34, 464 S.E.2d at 309. Judge Robert Gaines entered judgment upon the jury verdict, and the judgment contained findings that referenced a declaratory judgment action that the plaintiff had filed before trial:

- 7. The Plaintiffs have instituted a second action against St. Paul Fire and Marine and Hartford Insurance Company . . . to determine the respective rights of the parties to the benefits of the Hartford underinsured motorist coverage and to determine the amount of such coverage.
- 8. That on or about August 28, 1992, an order was entered in that action by the Honorable Robert P. Johnston which holds that . . . Hartford is allowed to reduce its limits by the amount of worker[s'] compensation paid or to be paid to Plaintiff and further holding that the proceeds of the Hartford underinsured policy are subject to the lien of St. Paul Insurance Company pursuant to North Carolina General Statute[s] [s]ection 97-10.2. That action is now on appeal to the North Carolina Court of Appeals. This Court is bound by the Order of Judge Johnston unless and until said Order is modified by the Court of Appeals or any other Court of competent jurisdiction. This Court has not addressed the issues raised in that action.

Id. at 35, 464 S.E.2d at 309-10 (first alteration added).

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Based on these findings. Judge Gaines determined that St. Paul was entitled to a lien on all workers' compensation benefits it had paid, and would pay, to the plaintiff. Id. at 35, 464 S.E.2d at 310. As noted in Judge Gaines' judgment, Judge Johnston's order allowed Hartford to reduce its limits by the amount of workers' compensation paid or to be paid to the plaintiff, and held that the Hartford UIM policy's proceeds were subject to the lien of St. Paul for all amounts paid or to be paid to the plaintiff. Id. This Court reversed the former portion of that order but affirmed the latter portion of the order allowing St. Paul's lien against the Hartford UIM benefits. Hieb v. St. Paul Fire & Marine Ins. Co., 112 N.C. App. 502, 435 S.E.2d 826 (1993) (*Hieb I*). Shortly after the decision in *Hieb I*, Hartford tendered its UIM policy limit of \$475,000.00 in accordance with the orders of Judges Johnston and Gaines. Hieb, 121 N.C. App. at 36, 464 S.E.2d at 310 (hereinafter referred to as *Hieb II*). However, the plaintiff and St. Paul could not agree on the distribution of those proceeds, as St. Paul asserted that none of the Hartford money could be disbursed to the plaintiff until St. Paul's lien was set and paid in full. Id.

Consequently, the plaintiff moved Judge Claude Sitton to determine the amount of St. Paul's lien pursuant to subsection 97-10.2(j). Id. According to the version of subsection 97-10.2(j) in effect at that time, a superior court judge's authority to determine the amount of a workers' compensation lien was triggered only by (1) a judgment that was insufficient to compensate the workers' compensation carrier's subrogation claim<sup>1</sup> or (2) a settlement. Id. at 37, 464 S.E.2d at 311 (citing N.C. Gen. Stat. § 97-10.2(j) (1991) ("[I]n the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply. . . . ") (emphasis added). Exercising his discretion under subsection 97-10.2(j), Judge Sitton ordered that St. Paul was entitled to recover "\$241,677.77 as full satisfaction of any workers['] compensation lien it may have on . . . benefits paid or to be paid" to the plaintiff, and that the plaintiff receive the remainder of the Hartford UIM proceeds. Id. at 36-37, 464 S.E.2d at 310-11.

<sup>1.</sup> Subsection 97-10.2(j) was amended in June 1999. N.C. S.L. 1999-194, s.2. The amendment eliminated the requirement that a third-party judgment be insufficient to compensate the workers' compensation carrier before the superior court could exercise its discretion and determine the subrogation amount. As noted above, a third-party judgment for any amount of damages will now trigger the superior court's authority to determine the amount of a workers' compensation lien. *See* N.C. Gen. Stat. § 97-10.2(j) (2015).

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St. Paul appealed and a divided panel of this Court reversed. After stating that one superior court judge generally may not overrule or modify the judgment of another superior court judge ("the superior court judge rule"), the *Hieb II* Court recognized that subsection 97-10.2(j) provided an exception to this rule. *Id.* at 37, 464 S.E.2d at 311 ("There are, however, some statutory exceptions to [the superior court judge] rule. *See, e.g.*, North Carolina General Statutes §§ 97-10.2 (1991) and 1A-1, Rule 60 (1990)."). However, the *Hieb II* Court ultimately held that subsection 97-10.2(j) had not been "call[ed] . . . into play" and that Judge Sitton lacked the authority to modify the other superior court judges' orders because the "'judgment' (in excess of \$1.25 million) exceeded any amount necessary to reimburse" St. Paul at that time.<sup>2</sup> *Id.* at 38, 464 S.E.2d at 311. The plaintiff appealed this Court's decision in *Hieb II* to the North Carolina Supreme Court. *Hieb*, 344 N.C. at 407, 474 S.E.2d at 325.

On appeal to the North Carolina Supreme Court, the plaintiff argued, *inter alia*, that the superior court judge rule was not implicated because "the issue previously decided by Judges Gaines and Johnston was whether a workers' compensation carrier could assert a lien, pursuant to N.C.G.S. § 97-10.2, against the proceeds of UIM insurance purchased by someone other than the insured party's employer, while the issue before Judge Sitton was the *amount* of such workers' compensation lien that should be allowed." *Hieb*, 344 N.C. at 408, 474 S.E.2d at 326. After noting that "Judge Gaines' conclusions of law explicitly state in accordance with Judge Johnston's order that 'St. Paul Fire and Marine Insurance Company is entitled to a lien against the proceeds of the Hartford underinsured motorist policy *for all amounts paid*, *or to be paid*, *to* [the p]laintiff . . . as worker[s'] compensation benefits[,]' our Supreme Court rejected the plaintiff's argument and held that the superior court judge rule applied:

[I]t is clear that the amount of the lien is to be the total of all amounts paid or to be paid to plaintiff as workers' compensation benefits. Additionally, the Court of Appeals issued a unanimous opinion [(in  $Hieb\ I$ )] affirming that portion of Judge Johnston's order relating to the workers' compensation lien of St. Paul. . . . Thus, the issue of amount was dealt with and decided three times prior to plaintiffs

<sup>2.</sup> When  $Hieb\ II$  was decided, "St. Paul had paid [the plaintiff] approximately \$266,400.00 in workers' compensation benefits." 121 N.C. App. at 38, 464 S.E.2d at 311.

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presenting the matter to Judge Sitton. Judge Sitton's order, setting a lesser amount of the lien to be repaid, does not address a different issue than that previously decided by Judges Johnston and Gaines.

*Id.* Even so, the Supreme Court went on to consider the plaintiff's argument that subsection 97-10.2(j) gave Judge Sitton the authority to determine the amount of St. Paul's lien. *Id.* The Court, however, rejected this contention based upon the rationale stated in *Hieb II*:

Th[e] judgment [obtained by the plaintiff] is greater than the amount of St. Paul's lien at the time of Judge Sitton's order and therefore is not "insufficient to compensate the subrogation claim." On this record, we hold that the Court of Appeals did not err in concluding that Judge Sitton did not have authority under the provisions of N.C.G.S. § 97-10.2(j) to modify the previous judgments.

Hieb, 344 N.C. at 410, 474 S.E.2d at 327.

Our review of the decisions in *Hieb* reveals that the superior court judge rule does not apply in the present case. As noted above, the *Hieb II* Court recognized that subsection 97-10.2(j) provides a specific statutory exception to this rule. 121 N.C. App. at 37, 464 S.E.2d at 311. Likewise, the clear implication of the Supreme Court's analysis in Hieb is that subsection 97-10.2(j) would have provided an exception to the superior court judge rule had the plaintiff's judgment been insufficient to compensate St. Paul's subrogation claim, thereby triggering Judge Sitton's authority to determine, in his discretion, the amount of the workers' compensation lien. See Hieb, 344 N.C. at 409-10, 474 S.E.2d at 326-27 (addressing whether Judge Sitton's authority under subsection 97-10.2(j) had been triggered); see also Johnson v. S. Indus. Constructors, Inc., 347 N.C. 530, 534, 538, 495 S.E.2d 356, 358-59, 361 (1998) (citing the Supreme Court's decision in *Hieb* and holding that "since the judgment for plaintiff against the third-party tort-feasor in this case, in the amount of \$219.052.20, is greater than the amount of the lien at the time of the trial court's order and is thus not 'insufficient to compensate the subrogation claim,' the trial court did not have jurisdiction to determine the amount of the lien pursuant to N.C.G.S. § 97-10.2(j)").

Against this backdrop, we also conclude that subsection 97-10.2(j) provides a statutory exception to the doctrine of res judicata. Under subsection 97-10.2(j)'s plain language, the lien amount is to be determined at a later, separate proceeding, one that occurs *after* an employee has "obtained" a judgment against (or settled with) the third party, and after

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one of the parties has elected to "apply" for such a determination. See N.C. Gen. Stat. § 97-10.2(j). Use of the words "obtained" (past tense and past participle of the verb "obtain") and "apply" (present tense) in the statute indicates that the legislature intended subsection 97-10.2(j) to operate as follows: Once an employee has obtained a judgment against a third party, either party may apply to the appropriate superior court judge to determine the subrogation amount. At that point, a determination may be made, in the judge's discretion, after the employer and insurance carrier have been given notice and after all interested parties have been given the opportunity to be heard on the matter. See id. Case law from this Court supports this interpretation. See, e.g., Dion v. Batten, \_\_ N.C. App. \_\_\_, \_\_\_, 790 S.E.2d 844, 850 (2016) ("In the present case, a judgment was obtained by Plaintiff against Defendant, and [Defendant's UIM carrier] applied . . . for a determination of the subrogation amount. Under the plain language of [subsection 97-10.2(j)], the authority of the trial court was triggered, allowing it to exercise discretion in determining the subrogation amount."); Wood, 160 N.C. App. at 700, 586 S.E.2d at 804 (considering whether the superior court abused its discretion in reducing the defendants' workers' compensation lien after the plaintiff obtained a default judgment against a third-party tortfeasor and applied for determination of the lien amount). Because the statute specifically contemplates that a judgment will be issued in an action between the employee and a third party before "either party" may "apply" to determine the subrogation amount, see N.C. Gen. Stat. § 97-10.2(j), it would be nonsensical to hold that the prior judgment bars further litigation of the lien issue. See Helms v. Powell, 32 N.C. App. 266, 269, 231 S.E.2d 912, 914 (1977) ("Under the normal rules of statutory construction, the language of a statute will be interpreted to avoid absurd or illogical consequences.") (citation omitted).

It is also significant that subsection "97-10.2(j) grants *limited jurisdiction* to the superior court to determine the amount of the employer's lien[.]" *Leggett v. AAA Cooper Transp., Inc.*, 198 N.C. App. 96, 99, 678 S.E.2d 757, 760 (2009) (emphasis added). The statute "provides a 'procedural remedy' and not a substantive claim." *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203, 207, 742 S.E.2d 205, 208 (2013). As such, the second element of res judicata, "an identity of the cause of action in both the earlier and the later suit," cannot be proven in the present case. *Erler*, 141 N.C. App. at 316, 540 S.E.2d at 68. Murray's negligence action against Moody involved a civil claim for money damages, a full trial in which factual issues were resolved by a jury, and a judgment entered upon the jury's verdict. In contrast, Moody's motion to determine the amount of the workers' compensation lien is purely

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statutory and narrow in scope. Once the superior court's limited jurisdiction under subsection 97-10.2(j) is properly invoked, the court simply performs a judicial act in which it "must... consider the factors that are expressly listed in the statute[,]" *Estate of Bullock*, 188 N.C. App. at 526, 655 S.E.2d at 874, and make "a judicial value judgment, which is factually supported . . . [by] findings of fact and conclusions of law[.]" *In Re Biddix*, 138 N.C. App. at 504, 530 S.E.2d at 72.

This Court has held that "orders entered in a [statutory] proceeding . . . in which an executor must show cause why he should not be removed, do not constitute res judicata as to a later civil action for damages between the parties or collaterally estop the bringing of such an action." Shelton v. Fairley, 72 N.C. App. 1, 5, 323 S.E.2d 410, 414 (1984). In support of its holding, the *Shelton* Court observed that "'[t]he res judicata doctrine precluding relitigation of the same cause of action has been held inapplicable where the performance of an act was sought in one action and a money judgment in the other." Id. at 8, 323 S.E.2d at 414 (citation omitted). There is no reason why this general principle should not apply in reverse here, as there is a substantial distinction between Murray's civil negligence action for damages and Moody's later motion to determine the amount of the workers' compensation lien. The amended judgment, therefore, cannot be res judicata as to the final amount of the workers' compensation lien. Rather, that determination must be made by the superior court upon consideration of the mandatory statutory factors contained in subsection 97-10.2(j).

To sum up, Murray (the employee) obtained a judgment against Moody (the third-party defendant) in the negligence action. Moody later applied—as he was entitled—for a determination of the amount of the workers' compensation lien. Unnamed defendants were then given notice and an opportunity to be heard on the matter. Under subsection 97-10.2(j)'s plain language, the superior court's authority was triggered by Moody's motion. Judge Young should have exercised his discretion and determined the subrogation amount, as Judge Hobgood's amended order in the negligence action was not res judicata to Moody's present action. Accordingly, Judge Young erred in concluding that he did not have jurisdiction to consider Moody's motion for the determination of unnamed defendants' lien pursuant to subsection 97-10.2(j).

For the reasons stated above, we reverse Judge Young's order denying Moody's motion and remand to the trial court for proper determination of the amount of the workers' compensation lien on Murray's recovery from Moody in the negligence action. On remand, the superior court should receive evidence "as to matters which must be considered"

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under subsection 97-10.2(j) and enter an order with findings that reflect full consideration of the mandatory factors. *Hill v. Hill*, 229 N.C. App. 511, 530, 748 S.E.2d 352, 365 (2013) (addressing remand in equitable distribution when trial court failed to make statutorily-required findings of fact); *see Alston v. Fed. Exp. Corp.*, 200 N.C. App. 420, 425, 684 S.E.2d 705, 708 (2009) (reversing and remanding for additional findings when "no findings of fact in the trial court's order [addressed certain] mandatory statutory factors" contained in subsection 97-10.2(j)).

Finally, we note that this case is unique in the context of subsection 97-10.2(j) because unnamed defendants have not simply asserted a lien on Murray's recovery; instead, the subrogation amount they seek to recover is memorialized in a judgment granted in favor of Murray and Evans. If the trial court decides to reduce the lien amount, it may be necessary for Moody to file an appropriate motion to set aside the amended judgment.

#### III. Conclusion

We reverse the trial court's order and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and INMAN concur.

[252 N.C. App. 155 (2017)]

WILTON GENE ROUNTREE, PLAINTIFF
v.
CHOWAN COUNTY, DEFENDANT

No. COA16-555

Filed 7 March 2017

# Counties—retirement benefits—negligent misrepresentation—summary judgment—duty of care—justifiable reliance

The trial court did not err by granting summary judgment in favor of defendant county on a negligent misrepresentation claim based on employment rendering plaintiff ineligible to receive retirement benefits. Plaintiff failed to forecast evidence establishing that the county owed plaintiff a duty of care apart from the county's purported contractual obligation. Even assuming the existence of a separate legal duty, plaintiff failed to produce evidence showing justifiable reliance.

Appeal by plaintiff from order entered 18 December 2015 by Judge J. Carlton Cole in Chowan County Superior Court. Heard in the Court of Appeals 2 November 2016.

Maginnis Law, PLLC, by Edward H. Maginnis and T. Shawn Howard, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, LLP, by Theresa M. Sprain and Lawrence A. Moye, IV, for defendant-appellee.

ELMORE, Judge.

Wilton Gene Rountree (plaintiff), a former tax administrator, retired from his employment with Nash County before accepting a new position with Chowan County (defendant) on a limited basis. After working for nearly two years, plaintiff learned that the terms of his employment with defendant had rendered him ineligible to receive retirement benefits. He resigned and sued defendant for breach of contract and negligent misrepresentation. The trial court granted summary judgment for defendant on both claims.

Plaintiff appeals, arguing that the trial court erred in granting summary judgment on his negligent misrepresentation claim. Upon review, we hold that summary judgment for defendant was proper because (1) plaintiff failed to forecast evidence which, taken as true, would establish

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that defendant owed plaintiff a duty of care apart from defendant's purported contractual obligation; and (2) assuming the existence of a separate legal duty, plaintiff failed to produce evidence tending to show that his reliance was justifiable. Affirmed.

## I. Background

In 2009, defendant was experiencing financial difficulties. It had been forced to increase taxes twice in the preceding year to fund its operations and, to make matters worse, its longtime tax administrator resigned unexpectedly. Plaintiff was referred to Peter Rascoe, the Chowan County manager, as a potential replacement. Plaintiff had served as a tax administrator, first in Edgecombe County and then Nash County, before his retirement in February 2009. Impressed with plaintiff's experience and reputation, Rascoe contacted plaintiff to discuss the position.

As a retiree, plaintiff was receiving benefits through the Local Government Employees' Retirement System (LGERS). During his initial meeting with Rascoe, plaintiff expressed interest in the tax administrator position but made clear that he wanted to protect his retirement benefits. After their meeting, Rascoe sent plaintiff an offer letter describing the terms of the proposed employment agreement. The letter provided in part:

As a retiree realizing benefits from the local government retirement system and health insurance benefits from your former employer, you have expressed interest in the position on a contract basis. I am prepared to offer you such an arrangement along the parameters we discussed. As such, the position if accepted by you, would be an "at will" contract relationship. I am prepared to offer such an arrangement to you for at least a term of twenty-four months with the hope that it may continue for a longer period if both parties are in agreement.

On the more specific conditions, the letter stipulated that plaintiff would receive an annual salary of \$46,800.00, or \$30.00 per hour based on the number of actual hours worked per week, with a target of a thirty-hour work week. Defendant would not withhold retirement contributions, as plaintiff was already receiving those benefits.

Rascoe, an attorney, knew the state had employment restrictions in place for its retirees which, if not observed, could disqualify them from their retirement benefits. During his deposition, Rascoe explained that he

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was acting in defendant's interest when he drafted the letter although he tried to address plaintiff's concerns. He did not represent or guarantee that plaintiff's benefits would be safe under the proposed terms of employment but he did believe that plaintiff would find them suitable. Rascoe testified: "It was my understanding that we had presented him . . . with an arrangement that he could agree to that he would have—he could make the determination whether or not it affected his retirement . . . , but it was our understanding . . . of the system that this did that. We thought."

Plaintiff himself was also familiar with LGERS. When he prepared to retire from his position in Nash County, he had consulted the State Employee Retirement Handbook, which contained the benefits eligibility requirements, to determine the amount of money he could expect to receive in retirement. He acknowledged during his deposition that he would have been responsible for maintaining his own benefits eligibility. According to plaintiff's testimony and affidavit, however, Rascoe "assured" him that the employment contract would protect his benefits. Beyond his conversations with Rascoe, plaintiff performed no due diligence to confirm whether defendant's proposed terms of employment would affect his benefits.

Plaintiff eventually accepted the position under the terms set forth in the offer letter. He worked as the tax administrator without incident for nearly two years until 1 August 2011, when he received a written notice from the North Carolina Retirement Systems Division. The notice informed plaintiff that, based on his employment agreement, he had returned to "regular employment" on 1 August 2009 and his compensation since then was subject to retirement contributions, which had not been made. In addition, because the Division had not been informed of plaintiff's "return to service," he had received \$114,448.32 in monthly retirement benefits to which he was not entitled as an "employee" under LGERS. Plaintiff resigned the following day.

Beginning in September 2011, the Division began deducting \$1,000.00 each month from plaintiff's retirement benefits to repay the \$114,448.32 which he had received over the past two years. Defendant later provided counsel to plaintiff, and plaintiff entered into a settlement agreement with the Division to repay \$30,000.00 of the \$114.448.32 in wrongful distributions. Of the \$30,000.00 which plaintiff agreed to repay, \$11,000.00 had already been satisfied through monthly deductions, leaving \$19,000.00 to be paid in the same manner.

On 29 April 2013, plaintiff filed a complaint against defendant alleging breach of contract and negligent misrepresentation. Defendant

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answered and moved for summary judgment on each of plaintiff's claims, which the trial court granted. Plaintiff timely appeals.

#### II. Discussion

On appeal, plaintiff does not challenge the trial court's ruling on his breach of contract claim. He argues instead that the court erred in granting summary judgment on his negligent misrepresentation claim because he demonstrated genuine issues of material fact for trial. Defendant maintains that the trial court's grant of summary judgment was proper for two reasons: first, plaintiff's claim for negligent misrepresentation is barred by the economic loss rule because it impermissibly arises out of the same alleged contractual duty as his original breach of contract claim; and second, plaintiff failed to establish the essential elements of negligent misrepresentation—specifically, a duty of care, justifiable reliance, and detrimental reliance.

"Our standard of review of an appeal from summary judgment is de novo." In re Will of Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Such judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). The movant has "the burden of establishing the lack of any triable issue." Lord v. Beerman, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008) (citing Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 62–63, 414 S.E.2d 339, 341–42 (1992)). The movant may satisfy its burden "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." Id. (quoting Collingwood v. G.E. Real Estate Equities, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)); see also Ussery v. Branch Banking & Trust Co., 368 N.C. 325, 335, 777 S.E.2d 272, 279 (2015) ("When the proof offered by either party establishes that no cause of action or defense exists, summary judgment may be granted." (citation omitted)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." Dalton v. Camp, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted).

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d

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609, 612 (1988) (citations omitted); see also id. at 203, 214, 367 S.E.2d at 611, 617 (adopting the approach to negligent misrepresentation set forth in Restatement (Second) of Torts § 552 (1977)); Simms v. Prudential Life Ins. Co. of Am., 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000) (articulating elements of negligent misrepresentation).

The parties first disagree as to whether the economic loss rule bars plaintiff's negligent misrepresentation claim. The economic loss rule, as it has developed in North Carolina, generally bars recovery in tort for damages arising out of a breach of contract:

A tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.

Lord v. Customized Consulting Specialty, Inc., 182 N.C. App. 635, 639, 643 S.E.2d 28, 30–31 (2007) (alteration omitted) (citations omitted); see also N.C. State Ports Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 81–82, 240 S.E.2d 345, 350–51 (1978) (explaining that absent four enumerated exceptions, "a breach of contract does not give rise to a tort action by the promisee against the promisor"), rejected in part on other grounds by Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs., Inc., 313 N.C. 230, 241–43, 328 S.E.2d 274, 289–82 (1985).

Plaintiff alleged in his complaint that defendant breached the employment agreement which, according to plaintiff, "required Defendant to provide employment terms that would not limit, abridge, or diminish Plaintiff's right to receive Retirement Benefits from LGERS." If this condition was part of the agreement, as plaintiff initially pleaded, then his tort claim would fail as a matter of law because "a breach of contract does not give rise to a tort action." *N.C. State Ports Auth.*, 294 N.C. at 81, 240 S.E.2d at 350. In support of his tort claim, however, plaintiff pleaded in the alternative that a misrepresentation occurred prior to the execution of the agreement for the purpose of inducing plaintiff to enter into a contract: "Defendant . . . represented to Plaintiff that it was offering employment terms that would not violate his eligibility for retirement benefits through LGERS," and "Defendant, hoping to induce Plaintiff into employment, intended for him to rely upon the aforesaid representation regarding continued eligibility for retirement benefits." Defendant

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argues that plaintiff's tort claim is "merely a restatement of his failed contract claim disguised as a distinct cause of action." But if the evidence otherwise showed that defendant had no contractual obligation to protect plaintiff's retirement benefits, then plaintiff's tort claim, construed liberally, would not be barred by the economic loss rule.

Even so, a viable tort action "must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties." *Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 342, 303 S.E.2d 365, 373 (1983) (emphasis added) (citation omitted). "When there is no dispute as to the facts or when only a single inference can be drawn from the evidence, the issue of whether a duty exists is a question of law for the court." *Mozingo v. Pitt Cnty. Mem'l Hosp., Inc.*, 101 N.C. App. 578, 588, 400 S.E.2d 747, 753 (1991) (citations omitted), *aff'd*, 331 N.C. 182, 415 S.E.2d 341 (1992).

A breach of duty that gives rise to a claim of negligent misrepresentation has been defined as:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, [and thus] is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Simms, 140 N.C. App. at 534, 537 S.E.2d at 241 (alteration in original) (emphasis omitted) (quoting *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 218, 513 S.E.2d 320, 323–24 (1999)) (internal quotation marks omitted).

Such a duty commonly arises within professional relationships. See, e.g., Ballance v. Rinehart, 105 N.C. App. 203, 207–08, 412 S.E.2d 106, 109 (1992) (real estate appraisers); Stanford v. Owens, 46 N.C. App. 388, 400, 265 S.E.2d 617, 625 (1980) (engineers); Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 271–72, 257 S.E.2d 50, 59 (1979) (architects). In Raritan River Steel, for example, two plaintiff-corporations claimed to have extended credit to Intercontinental Metals Corporation (IMC) based upon an audit report of IMC's financial status. 322 N.C. at 203, 367 S.E.2d at 611. IMC had retained a firm of certified public accountants to prepare the report. Id. When IMC defaulted, the plaintiffs sued the accounting firm for negligent misrepresentation,

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alleging that plaintiffs "incurred damages when they extended credit to IMC in reliance on incorrect information contained in an audit report on IMC's financial status prepared for IMC by defendants." *Id.* As to whether the accounting firm owed a duty of care to the plaintiffs, the Supreme Court explained:

As we understand it, under the Restatement approach an accountant who audits or prepares financial information for a client owes a duty of care not only to the client but to any other person, or one of a group of persons, whom the accountant or his client intends the information to benefit; and that person reasonably relies on the information in a transaction, or one substantially similar to it, that the accountant or his client intends the information to influence.

Id. at 210, 367 S.E.2d at 614; see also Restatement (Second) of Torts § 552 cmt. e (1977) ("When the information [supplied] concerns a fact not known to the recipient, he is entitled to expect that the supplier will exercise that care and competence in its ascertainment which the supplier's business or profession requires and which, therefore, the supplier professes to have by engaging in it.").

We have also recognized, albeit in a more limited context, that a separate duty of care may arise between adversaries in a commercial transaction. In Kindred of North Carolina, Inc. v. Bond, 160 N.C. App. 90, 584 S.E.2d 846 (2003), the buyer sued the seller for negligent misrepresentation in connection with the purchase of a closely-held business. Id. at 92–95, 584 S.E.2d at 848–49. After entering into a purchase agreement, the buyer discovered that the seller had provided inaccurate financial information about the company. Id. at 93–95, 584 S.E.2d at 848–49. This Court held that the seller owed a duty to the buyer during the course of negotiations "to provide accurate, or at least negligencefree financial information" about the company because the seller "was the only party who had or controlled the information at issue" and the buyer "had no ability to perform any independent investigation." Id. at 101, 584 S.E.2d at 853 (emphasis added) (citing Libby Hill Seafood Rests., Inc. v. Owens, 62 N.C. App. 695, 698, 303 S.E.2d 565, 568 (1983) ("[W]here material facts are available to the vendor alone, he or she *must* disclose them.")).

Unlike the buyer in *Kindred*, however, here plaintiff has failed to establish a viable tort action based on a violation of a duty of care. The dispute arose out of a potentially adversarial arm's-length negotiation

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between an employer and prospective employee. Defendant did not have exclusive access or control over the benefits eligibility information, which was publicly available and readily accessible. In addition, plaintiff had an equal opportunity to perform his own investigation to determine whether the proposed terms of employment were suitable. In the course of their discussions, therefore, defendant had no legal duty to provide accurate information regarding plaintiff's continued benefits eligibility.

Even assuming that defendant owed to plaintiff a duty of care, plaintiff's negligent misrepresentation claim fails for another reason. Specifically, plaintiff failed to produce evidence tending to show that he made a reasonable inquiry into Rascoe's representations, that he was denied the opportunity to investigate, or that he could not have learned the true facts through reasonable diligence. While normally a question for the jury, the only conclusion that can be drawn from the evidence is that plaintiff's reliance was not justifiable. *See Dallaire v. Bank of Am.*, *N.A.*, 367 N.C. 363, 369, 760 S.E.2d 263, 267 (2014) ("Whether a party's reliance is justified is generally a question for the jury, except in instances in which 'the facts are so clear as to permit only one conclusion.' "(quoting *Marcus Bros. Textiles*, *Inc.*, 350 N.C. at 225, 513 S.E.2d at 327)).

Plaintiff maintains that, according to Walker v. Town of Stoneville, 211 N.C. App. 24, 712 S.E.2d 239 (2011), he was under no obligation to undertake his own investigation into the accuracy of defendant's representations. In that case, the defendant Town of Stoneville argued that Walker had a "duty to investigate" the Town's representations, and because Walker "failed to show he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence," the evidence was insufficient to establish reasonable reliance. Id. at 34, 712 S.E.2d at 246. Rejecting the Town's contention, this Court first explained that "'a man is not expected to deal with another as if he is a knave, and certainly not unless there is something to excite his suspicion.' " Id. (quoting White Sewing Mach. Co. v. Bullock, 161 N.C. 1, 8, 76 S.E. 634, 637 (1912)). In addition, the evidence showed that "[Walker] and the Town were not on equal footing," and there was nothing in the Town's representations "that would put a person of ordinary prudence upon inquiry." Id. at 34, 712 S.E.2d at 246-47. Because "the evidence was sufficient to show that [Walker] could not have learned the true facts by exercise of reasonable diligence," the Court did not specifically address whether Walker "was required to show that he was denied the opportunity to investigate, or that he could not have learned the true facts by exercise of reasonable diligence." Id. at 35, 712 S.E.2d at 247.

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At least two Supreme Court cases decided since Walker support defendant's argument that plaintiff was required to show more to establish justifiable reliance. In Dallaire, the Court held that "a borrower cannot establish a claim for negligent misrepresentation based on a loan officer's statements about lien priority if the borrower fails to make reasonable inquiry into the validity of those statements." 367 N.C. at 364, 760 S.E.2d at 264. Because the borrowers offered no evidence that they inquired, or were prevented from inquiring, into the accuracy the loan officer's statements, the Court affirmed summary judgment for the lender on the borrower's negligent misrepresentation claim. Id. at 369-70, 760 S.E.2d at 267-68; see also Pinney v. State Farm Mut. Ins. Co., 146 N.C. App. 248, 256, 552 S.E.2d 186, 192 (2001) ("[W]hen a party relying on a 'misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence.' " (citation omitted)), disc. review denied, 356 N.C. 438, 572 S.E.2d 788 (2002).

Similarly, in Arnesen v. Rivers Edge Golf Club & Plantation, Inc., 368 N.C. 440, 781 S.E.2d 1 (2015), the Court relied on Dallaire to affirm the dismissal of the plaintiffs' negligent misrepresentation claim pursuant to Rule 12(b)(6). *Id.* at 451–52, 781 S.E.2d at 9–10. The Court explained: "Reliance is not reasonable if a plaintiff fails to make any independent investigation or fails to demonstrate he was prevented from doing so." Id. at 449, 781 S.E.2d at 8 (citations omitted) (internal quotation marks omitted). Rather, "to establish justifiable reliance a plaintiff must sufficiently allege that he made a reasonable inquiry into the misrepresentation and allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." Id. at 454, 781 S.E.2d at 11 (citations omitted) (internal quotation marks omitted). Because the plaintiffs did "not allege that they inquired, or were prevented from inquiring," into certain appraisal information, they failed to establish justifiable reliance. Id. at 451, 781 S.E.2d at 9 (citing Dallaire, 367 N.C. at 370, 760 S.E.2d at 268); see also Fazzari v. Infinity Partners, LLC, 235 N.C. App. 233, 241, 762 S.E.2d 237, 242 (2014) (affirming summary judgment for the defendant-lender where the plaintiffs failed to forecast evidence that they conducted an independent inquiry into the value of lots in planned subdivision or were prevented from doing so).

In this case, plaintiff failed to produce any evidence—or allege in his complaint—that he made a reasonable inquiry into Rascoe's representations, that he was denied the opportunity to investigate, or that

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he could not have learned the true facts through reasonable diligence. On the contrary, defendant directs our attention to plaintiff's deposition testimony in which plaintiff stated that he was familiar with LGERS and was aware that the rules governing his benefits were available in the State Employee Retirement Handbook. Plaintiff also confirmed that his understanding of his benefits eligibility was based purely on his review of the handbook, and that he even consulted the handbook for other benefits information as he prepared to retire from Nash County. And while he acknowledged his own responsibility for maintaining his personal retirement benefits, he did not consult with anyone else regarding his eligibility requirements before accepting the position with defendant. In the absence of any evidence tending to show justifiable reliance, the trial court properly granted summary judgment in favor of defendant.

## III. Conclusion

Because defendant met its burden by proving the absence of a separate duty of care and justifiable reliance, we affirm the trial court's order granting summary judgment for defendant on plaintiff's negligent misrepresentation claim.

AFFIRMED.

Judges HUNTER, JR. and DILLON concur.

[252 N.C. App. 165 (2017)]

STATE OF NORTH CAROLINA
v.
LORI LEE BABICH

No. COA16-762

Filed 7 March 2017

# Evidence—expert testimony—retrograde extrapolation—Daubert fit test—driving while impaired—no prejudicial error

Although the trial court abused its discretion in a driving while impaired case by admitting the State's expert testimony on retrograde extrapolation since it was not sufficiently tied to the particular facts of this case and failed the *Daubert* "fit" test, it was not prejudicial error in light of the strength of the State's evidence. There was no reasonable possibility that exclusion of the expert's testimony would have affected the outcome of this case.

Appeal by defendant from judgments entered 26 February 2016 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 24 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Hal F. Askins, for the State.

Sharon L. Smith for defendant.

DIETZ, Judge.

Defendant Lori Lee Babich appeals her conviction for habitual impaired driving, challenging the admission of retrograde extrapolation testimony by the State's expert witness. That expert used Babich's 0.07 blood alcohol concentration one hour and forty-five minutes after the traffic stop to extrapolate that Babich had a blood alcohol concentration of 0.08 to 0.10 at the time of the stop. To reach this conclusion, the expert assumed that Babich was in a post-absorptive state at the time of the stop, meaning that alcohol was no longer entering Babich's blood-stream and thus her blood alcohol level was declining. The expert conceded that there were no facts to support this assumption. The expert made this assumption not because it was based on any facts in the case, but because her retrograde extrapolation calculations could not be done unless Babich was in a post-absorptive state.

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As explained below, we hold that the expert's testimony was inadmissible under the *Daubert* standard that applies to Rule 702 of the Rules of Evidence. Although retrograde extrapolation testimony often will satisfy the *Daubert* test, in this case the testimony failed *Daubert*'s "fit" test because the expert's otherwise reliable analysis was not properly tied to the facts of this particular case.

Although we conclude that this expert testimony was inadmissible under *Daubert*, we nevertheless uphold Babich's conviction. As explained below, in light of the strength of the State's evidence that Babich was appreciably impaired, there is no reasonable possibility that exclusion of the expert's testimony would have affected the outcome of this case. Accordingly, we find no prejudicial error in Babich's conviction and sentence.

## **Facts and Procedural History**

On 16 May 2014 at approximately 3:20 a.m., Officer Britton Creech of the Wilmington Police Department saw Defendant Lori Lee Babich driving her vehicle at a high speed in a 45 mile-per-hour zone. After an initial radar reading of 83 miles per hour, Officer Creech began pursuing Babich. While following her, Officer Creech registered a second radar reading of 91 miles per hour. Officer Creech then observed Babich brake before an intersection with a red light, slow down to approximately 45 miles per hour, and then cross the intersection despite the red light. Officer Creech pulled Babich over.

Babich immediately exited her vehicle and approached the officer. Officer Creech commanded Babich to stop and stay in her vehicle, but Babich did not comply, causing the officer to grab her and place her in handcuffs. The officer smelled alcohol on Babich's breath, Babich stumbled as she walked, and her eyes were glazed and red. Officer Creech removed the handcuffs and asked Babich to perform several field sobriety tests.

On the one-leg-stand test, Babich placed her foot on the ground two times and raised her arms for balance contrary to instructions. On the walk-and-turn test, Babich started over in the middle of the test and on three steps did not walk in a heel-to-toe manner as instructed. Finally, on the finger-to-nose test, Babich touched her face instead of her nose. Based on his observations and Babich's unsatisfactory performance on the sobriety tests, Officer Creech arrested Babich for driving while impaired.

At the police station, Officer Dwayne Ouellette, a certified chemical analyst, used an intoximeter breath testing instrument to administer a

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breath alcohol test to Babich. Officer Ouellette collected breath samples from Babich at 5:07 a.m. and 5:09 a.m. which both reported a breath alcohol concentration of 0.07. Babich had been stopped by Officer Creech at 3:26 a.m. and remained in his custody and under his observation until Officer Ouellette performed the breath test. During the time she was in custody, Babich did not consume any alcohol or have any opportunity to consume any alcohol.

The State charged Babich with reckless driving to endanger, driving while license revoked, speeding, driving while impaired, and habitual impaired driving. At trial, Bethany Pridgen, a forensic chemist with the Wilmington Crime Lab, testified as an expert witness for the State regarding retrograde extrapolation. Pridgen testified that she performed a retrograde extrapolation to estimate Babich's blood alcohol concentration at the time she was stopped. Based on her calculation, Pridgen gave a conservative estimate that Babich's blood alcohol concentration was between 0.08 and 0.10 at the time of the stop.

The jury convicted Babich of impaired driving, speeding, and reckless driving. Babich stipulated to three prior DWI convictions, constituting habitual status, and was sentenced to 19 to 32 months in prison. Babich timely appealed.

## **Analysis**

## I. Admissibility of the Retrograde Extrapolation Testimony

Babich contends that the retrograde extrapolation testimony of the State's expert witness was inadmissible under Rule 702(a)(1) because it was not based on sufficient facts or data. As explained below, although retrograde extrapolation testimony can be scientifically reliable, we hold here that the opinion of the State's expert was not sufficiently tied to the particular facts of this case and thus fails the *Daubert* "fit" test.

We review a trial court's admission of expert testimony for abuse of discretion. *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463 (1988). Our Supreme Court recently confirmed that Rule 702(a) of the Rules of Evidence "incorporates the standard from the *Daubert* line of cases" in federal evidentiary jurisprudence. *State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016). To be admissible under Rule 702(a), expert testimony "must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony must be based upon sufficient facts or data. (2) The testimony must be the product of reliable principles and methods. (3) The witness must have applied the principles and methods reliably to the facts of the case." *Id.* at 890, 787 S.E.2d at 9.

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In addition, even if expert scientific testimony might be reliable in the abstract, to satisfy Rule 702(a)'s relevancy requirement, the trial court must assess "whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharm.*, *Inc.*, 509 U.S. 579, 593 (1993). This ensures that "expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Id.* at 591 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). The Supreme Court in *Daubert* referred to this as the "fit" test. *Id.* 

We now apply these principles from Rule 702, *McGrady*, and *Daubert* to this case. At the outset, we note that Babich does not contend that *all* retrograde extrapolation of blood alcohol content is unreliable under Rule 702(a). Indeed, her own expert testified that retrograde extrapolation can be scientifically reliable if based on sufficiently reliable data. *See generally State v. Turbyfill*, \_\_ N.C. App. \_\_, \_\_, 776 S.E.2d 249, 256 (2015) ("[B]lood alcohol extrapolation is a scientifically valid field, which principles have been tested, subjected to peer review and publication, and undisputedly accepted in the scientific community and in our courts."). Babich instead focuses on the key underlying assumption that the State's expert used in her retrograde extrapolation analysis—that Babich was in a post-absorptive state at the time of the stop.

To extrapolate Babich's blood alcohol level at the time of her arrest, the State's expert started with Babich's blood alcohol test at the police station, which occurred one hour and forty-five minutes after her arrest. Babich's blood alcohol concentration in that test was 0.07.

The State's expert then used a mathematical formula to extrapolate Babich's blood alcohol concentration at the time of the traffic stop based on her 0.07 blood alcohol level one hour and forty-five minutes later. To do so, the expert used data from previous scientific research to devise an average alcohol elimination rate—a conservative estimate of the rate at which the average person eliminates alcohol from the bloodstream. Using this model, the expert opined that, because Babich had a blood alcohol concentration of 0.07 one hour and forty-five minutes after the traffic stop, she had a blood alcohol concentration of 0.08 to 0.10 at the time of the stop.

Importantly, this mathematical model is applicable only if the subject is in a "post-absorptive" or "post-peak" state—meaning that alcohol is no longer entering the subject's bloodstream and thus her blood alcohol level is declining. The State's expert acknowledged that there are many factors that can impact whether a person is in a post-absorptive

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or post-peak state, such as when the person last consumed alcohol (and how much was consumed), and whether the person consumed any food that could delay the alcohol's absorption into the bloodstream.

And, just as importantly, the State's expert conceded that she had *no factual information in this case* from which she could assume that Babich was in a post-absorptive state. But, because the expert's model would not work unless Babich was post-peak, the expert simply assumed that this was the case—although the expert readily conceded that she had no underlying facts to support this assumption:

Q: Moving to this case in particular, Ms. Babich, you've not been provided any data whatsoever, facts about when her last consumption of alcohol was, or whether she consumed food, 30 to, I mean, 90 minutes prior?

[STATE'S EXPERT]: No, I have not.

- Q. So you're assuming that she did—she's in the post-absorptive state?
- A. That's correct.
- Q. And that's not based really on any fact?
- A. Nope.
- Q. There is no fact that you've been presented to make that assumption?
- A. That's correct.
- Q. You have to make an assumption?
- A. In order to do the calculation, I make the assumption.
- Q. Again to clarify, for Ms. Babich specifically, if you have that information and if Ms. Babich was not in the post-absorptive state, would your opinion change?
- A. For the time of the incident? Yeah. I mean, if there was information that told me that at the time of the incident, you know, she had had something to drink 20 minutes before, then I would be like, well, I don't believe she's post-peak so it wouldn't be a fair—it wouldn't be fair to make that calculation because I can't make that assumption now because I've been given other data.

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Q. Would you make the calculation?

A. No.

Q. What if you had data about her consuming a beverage, the last consumption of alcoholic beverage being one hour before with food, she would not be in the post-absorptive state; correct?

A. Well, if I've been given that as a fact, now I have to make the assumption that she's pre-peak and—you cannot make the retrograde extrapolation calculation without assuming post-peak. So, yeah, it would definitely change. I wouldn't be able to do it, or I would say, well, within light of this type of information, I would now assume in the absorption phase during that time and then a retrograde extrapolation would not necessarily be an accurate assumption.

Q. So if Ms. Babich was not post-peak or not in the postabsorptive state, you would not have an opinion about her breath at the time?

#### A. That's correct.

In light of this testimony, the question posed in this case is straightforward: under *Daubert*, can an expert offer an opinion that extrapolates a criminal defendant's blood alcohol concentration where that extrapolation can be done only if the defendant was in a post-absorptive state, and the expert had no evidence on which to base the underlying assumption that the defendant was in a post-absorptive state? As explained below, we hold that expert testimony in this circumstance is inadmissible under *Daubert* because, as a matter of law, that testimony cannot satisfy the "fit" test.

To date, our State's appellate courts have not addressed this issue (either before or after the adoption of the *Daubert* methodology). But other courts have, and the majority of those courts have found that the evidence cannot satisfy the criteria of Rule 702(a).

For example, the New Mexico Supreme Court's decision in *State v. Downey* involved nearly identical facts. 195 P.3d 1244, 1252 (N.M. 2008). The state's expert assumed the defendant was in a post-absorptive state without any underlying facts to support that assumption. The court explained that "[g]iven that [the expert] did not have the facts necessary to plot Defendant's placement on the [blood alcohol concentration]

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curve, he could not express a reasonably accurate conclusion regarding the fact in issue: whether Defendant was under the influence of intoxicating liquor at the time of the collision." *Id.* The court held that the expert's testimony could not satisfy *Daubert*'s "fit" requirement because the expert did not have sufficiently reliable underlying facts to which he could apply his otherwise reliable methodology. *Id.* As the court explained, the expert's testimony "did not 'fit' the facts of the present case because he simply assumed for the purpose of his relation-back calculations that Defendant had ceased drinking prior to the collision and, therefore, was post-absorptive." *Id.* 

The New Mexico Supreme Court then addressed the implications of this holding, explaining that retrograde extrapolation can be (and often will be) admissible. But, at a minimum, the expert must have some facts from which the expert can assume that the defendant is in a post-absorptive state:

Experts may, and often do, base their opinions upon factual assumptions, but those assumptions in turn must find evidentiary foundation in the record. Here, by contrast, the State did not produce any evidence regarding when Defendant last consumed alcohol, much less the quantity consumed, which rendered [the expert's] assumption mere guesswork in the context of this particular case. Accordingly, because [the expert's] conclusions were nothing more than mere conjecture and should have been excluded, the trial court abused its discretion in permitting this evidence to go to the jury.

We recognize that information regarding when a defendant had begun or ceased drinking may be difficult to obtain absent an admission from the defendant. We point out, however, that the State may be able to glean this information from third-party witnesses or from circumstantial evidence.

## *Id.* (internal citations omitted).

Courts in other jurisdictions have reached the same conclusion when applying the *Daubert* test or similar evidentiary jurisprudence. *See*, *e.g.*, *People v. Floyd*, 11 N.E.3d 335, 342 (Ill. App. Ct. 2014); *State v. Wolf*, 605 N.W.2d 381, 385 (Minn. 2000); *State v. Dist. Ct. (Armstrong)*, 267 P.3d 777, 783 (Nev. 2011); *Commonwealth v. Petrovich*, 648 A.2d 771, 773–74 (Pa. 1994); *Mata v. State*, 46 S.W.3d 902, 916 (Tex. Crim. App. 2001).

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We agree with the New Mexico Supreme Court's analysis in *Downey*. Applying the requirements of Rule 702(a), as interpreted by our Supreme Court in *McGrady*, we hold that, when an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive or post-peak state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol.

When there are at least some facts that can support the expert's assumption that the defendant is post-peak or post-absorptive, the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing expert witness testimony. But where, as here, the expert concedes that her opinion is based entirely on a speculative assumption about the defendant—one not based on any actual facts—that testimony does not satisfy the *Daubert* "fit" test because the expert's otherwise reliable analysis is not properly tied to the facts of the case. *Daubert*, 509 U.S. at 593. Accordingly, we hold that the trial court abused its discretion by admitting the challenged expert testimony in this case.

## II. Harmless Error Analysis

Because we conclude that the trial court erred in admitting the State's expert testimony, we must address whether that error prejudiced Babich. "An error is not prejudicial unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." *State v. Mason*, 144 N.C. App. 20, 27–28, 550 S.E.2d 10, 16 (2001). "Where it does not appear that the erroneous admission of evidence played a pivotal role in determining the outcome of the trial, the error is harmless." *Id.* at 28, 550 S.E.2d at 16.

A defendant may be convicted of driving while impaired if the State proves that the defendant drove "(1) While under the influence of an impairing substance; or (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a). The jury in this case was instructed on both alternative grounds.

In *State v. Taylor*, this Court held that any error in the admission of retrograde extrapolation testimony necessary to prove the second ground in N.C. Gen. Stat. § 20-138.1(a) was harmless because of the strength of the evidence that the defendant was appreciably impaired

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under the first ground. 165 N.C. App. 750, 758, 600 S.E.2d 483, 489 (2004). The evidence of appreciable impairment in *Taylor* consisted of the following: "that [the officer] smelled an odor of alcohol on defendant's person at the accident scene, that defendant needed assistance with walking to the patrol car, that defendant had difficulty writing his statement on the appropriate lines, that defendant had a 'blank face,' and that defendant did not perform satisfactorily on field sobriety tests administered by [the officer]." *Id*.

We are unable to distinguish this case from Taylor. Here, the State presented evidence that the officer saw Babich drive 80 to 90 miles per hour while approaching a red light, suddenly slow down, and then drive through the red light at approximately 45 miles per hour. When the officer stopped Babich, he smelled alcohol on her breath and saw that she had glazed and bloodshot eyes. Babich also stumbled as she walked. Babich ignored the officer's instructions and repeatedly talked over him as he attempted to speak to her. Babich did not properly perform the field sobriety tests, including touching her face instead of her nose, using her other foot and hands to balance herself during the one-leg-stand test, and failing and starting over during the walk-and-turn test. Under Taylor, this evidence is sufficient to show that, even without the challenged expert testimony, there is no reasonable possibility that the jury would have reached a different result. Accordingly, although we find error in the trial court's evidentiary ruling, we hold that the error did not prejudice Babich and thus we uphold her conviction and sentence.

#### Conclusion

For the reasons discussed above, we hold that the trial court erred in admitting the retrograde extrapolation testimony of the State's expert witness, but find no prejudicial error.

NO PREJUDICIAL ERROR.

Judges BRYANT and HUNTER, JR. concur.

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STATE OF NORTH CAROLINA v. SHYMEL D. JEFFERSON, DEFENDANT

No. COA16-745

Filed 7 March 2017

## 1. Constitutional Law-felony murder-juvenile sentencing

A defendant who was fifteen years old when he was convicted of felony murder and sentenced to life in prison *with* the possibility of parole after twenty-five years did not show the existence of circumstances indicating that the sentence was particularly cruel and unusual as applied to him. The U.S. Supreme Court has not indicated that the individualized sentencing required in *Miller v. Alabama*, 183 L. Ed. 2d 407 (2012), extends to sentences beyond life without parole. However, there may be a case in which a mandatory sentence of life with parole for a juvenile is disproportionate in light of a particular defendant's age and immaturity.

## 2. Constitutional Law—juvenile sentencing for murder—issues noted but not addressed

In a case involving a juvenile sentenced to life in prison with the possibility of parole after twenty-five years, defendant did not raise the issue of whether his sentence violated the N.C. Constitution. Moreover, North Carolina remains the only state that permits juveniles as young as thirteen years old to be tried as adults without allowing them to appeal to return to the juvenile system—a provision which this defendant did not challenge.

Judge BRYANT concurring in the result only.

Appeal by Defendant from judgment entered 29 February 2016 by Judge Stanley L. Allen in Rockingham County Superior Court. Heard in the Court of Appeals 24 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan P. Babb, for the State.

The Phillips Black Project, by John R. Mills, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

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Shymel D. Jefferson ("Defendant") appeals his sentence of life imprisonment with the possibility of parole after a term of twenty-five years, alleging the statute mandating his sentence violates the Eighth Amendment of the United States Constitution pursuant to Miller v. Alabama, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). After review, we disagree.

## I. Facts and Background

On 25 January 2010, Defendant—then fifteen years old—was charged by petition with first-degree murder in Rockingham County Juvenile Court. Pursuant to N.C. Gen. Stat. § 7B-2200, which requires the juvenile court to transfer any defendant accused of a Class A felony to superior court, the case was transferred to Rockingham County Superior Court. On 8 February 2010, Defendant was indicted for the first-degree murder of Timothy Seay. The case was brought to trial on 29 May 2012. This Court summarized the facts as presented at trial in *State v. Jefferson*, No. 13-668, 2014 N.C. App. LEXIS 256 (N.C. Ct. App. Mar. 4, 2014) (unpublished).

On the night of 6 November 2009, defendant, Travis Brown, Shaquan Beamer ("Beamer"), and defendant's older cousin, Shavon Reid ("Shavon"), went to the Icehouse, a bar in Eden, North Carolina. Defendant was fifteen years old at this time and had been living with Shavon in Martinsville, Virginia. Prior to the night in question, defendant had begun carrying a pistol for protection. He brought the gun with him to the Icehouse but left it in the car when the group went inside.

At the Icehouse, defendant encountered Jason Gallant ("Gallant"), Timothy Seay ("Seay"), and Terris Dandridge ("Dandridge"). After about an hour in the bar, a fistfight broke out. Defendant, Dandridge, and Gallant were all involved; defendant and Dandridge were seen pushing each other. The fight was quickly broken up by bar security, and both groups were forced to go outside. Defendant left the bar and retrieved his gun from the car.

Once the crowd had moved into the street, Seay's group began taunting defendant's group. Defendant testified that he heard a gunshot during the encounter. He then fired his gun in the direction of the group of people where he thought the shot had come from until he ran out of bullets. Devin Turner, a witness to the incident, testified that

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the only people he saw firing were defendant and Shavon. Ultimately, two people were injured and one was killed as a result of the shooting. Gallant and Dandridge were wounded by gunshots to the wrist and leg, respectively. Seay was killed by a gunshot wound to the head and was also shot one time in the chest, with the bullet getting lodged in his shoulder. Police later recovered two types of shell casings from the scene - .40 caliber and .380. Expert testimony established that the nine .380 casings found at the scene and the bullet in Seay's shoulder were fired from defendant's gun.

Jefferson, 2014 N.C. App. LEXIS 256 at \*2-3. At trial, the medical examiner testified Seay was killed by the gunshot wound to his head, which involved a larger caliber bullet than the gunshot wound to his chest. The jury found Defendant guilty of first-degree murder under the felonymurder rule. On 8 June 2012, under then-applicable state law, the trial court sentenced Defendant to a mandatory term of life without the possibility of parole.

During the pendency of Defendant's appeal, the United States Supreme Court decided *Miller v. Alabama*, holding "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S. Ct. at 2460, 183 L. Ed. 2d 407, 414-15. In response, the General Assembly enacted N.C. Gen. Stat. § 15A-1340.19B, which provided, *inter alia*, the sentence for a defendant found guilty of first-degree murder solely under the felony murder rule shall be life imprisonment with the possibility of parole. N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2015). *Jefferson*, 2014 N.C. App. LEXIS 256 at \*6-7. A defendant sentenced under this act must serve a minimum of twenty-five years before becoming eligible for parole. N.C. Gen. Stat. § 15A-1340.19A (2015).

As a result, this Court overturned Defendant's sentence on appeal and remanded to the trial court for resentencing pursuant to § 15A-1340.19B. *Jefferson*, 2014 N.C. App. LEXIS 256 at \*6-7. On 29 February 2016, the trial court held resentencing proceedings, and imposed a sentence of life with the possibility of parole after twenty-five years. Defendant entered notice of appeal in open court.

#### II. Jurisdiction

Defendant appeals a final judgment of the superior court. As such, his appeal is proper pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a)(1) (2015).

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## III. Standard of Review

"When constitutional rights are implicated, the appropriate standard of review is de novo." In re Adoption of S.D.W., 367 N.C. 386, 391, 758 S.E.2d 374, 378 (2014) (citation omitted). When mounting a facial constitutional challenge<sup>1</sup>, "[a] party must show that there are no circumstances under which the statute might be constitutional." Beaufort County Bd. of Educ. v. Beaufort Count Bd. of Comm'rs, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009). "[T]he presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if [it] can be upheld on any reasonable ground." State v. Bryant, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (internal citations omitted).

## IV. Analysis

[1] Defendant challenges the constitutionality of N.C. Gen. Stat.  $\S$  15A-1340.19B(a)(1), contending the statute failed to provide the trial court with the discretion to consider mitigating factors and render an individualized sentence, as required by the United States Supreme Court in *Miller v. Alabama*. Because the Supreme Court has not indicated the individualized sentencing required in *Miller* extends to sentences beyond life without parole, we must presume the statute is constitutional, and defer to the legislature.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments" on criminal defendants. U.S. Const. amend VIII. Central to any analysis of the Eighth Amendment is the concept of proportionality. The United States Supreme Court has held the right against cruel and unusual punishment "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller*, 132 S. Ct. at 2462, 183 L. Ed. 2d at 417 (internal quotation marks and citations omitted). Applying this basic principle, the United States Supreme Court has issued three recent decisions limiting the State's ability to apply its "most severe penalties" to defendants who were less than eighteen years old when they committed their offenses. *Id.* at 2466, 183 L. Ed. 2d at 421.

First, in *Roper v. Simmons*, the Court considered "whether it is permissible under the Eighth and Fourteenth Amendments to the

<sup>1.</sup> While Defendant did not explicitly use this label, he makes no argument that the statute was applied unconstitutionally in his case and does not claim that the application of the law to his case was uniquely flawed. Rather, he merely asserts that N.C. Gen. Stat. § 15A-1340.19B(a)(1) does not provide a trial judge with sufficient discretion to consider his mitigating factors.

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Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime." 543 U.S. 551, 555-56, 161 L. Ed. 2d 1, 13 (2005). Because juveniles tend to display a "lack of maturity and an underdeveloped sense of responsibility," are vulnerable to "negative influences and outside pressures, including peer pressure," and generally possess a character that is "not as well formed" as an adult's, the Court concluded juvenile offenders may not reliably "be classified among the worst offenders." *Id.* at 569, 161 L. Ed. 2d at 21-22. Moreover, these same characteristics vitiate the penological justifications for the death penalty. *Id.* at 571, 161 L. Ed. 2d at 23. Because they lack self-control and rational cost-benefit thinking, juveniles are less likely to respond to the death penalty as a deterrent, and are less likely to be fully culpable for their actions. *Id.* As a result, *Roper* categorically barred the application of capital punishment to juvenile defendants. *Id.* at 578, 161 L. Ed. 2d at 28.

Next, in *Graham v. Florida*, the Court went further, barring the sentencing of juveniles to life without parole for non-homicide crimes. 560 U.S. 48, 176 L. Ed. 2d 825 (2010). While maintaining that a death sentence is "unique in its severity and irrevocability," the Court held it shared characteristics with a sentence of life without parole in that "[i]t deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence." *Graham*, 560 U.S. at 69-70, 176 L. Ed. 2d at 842 (internal citation omitted). Again focusing on the ramifications of immaturity on the penological rationale for giving the harshest sentences to juvenile offenders, the Court established another categorical rule, prohibiting "the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82, 176 L. Ed. 2d at 850.

Finally, in *Miller v. Alabama*, the Court contemplated whether the Eighth Amendment prohibited mandatory sentences of life without parole for juveniles convicted of homicide. 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Here, the Court synthesized its holdings in *Roper* and *Graham* to again institute a categorical bar. The Court trod more explicitly on the connection between the death penalty and life without parole, characterizing the latter as the "ultimate penalty for juveniles." *Miller*, 132 S. Ct. at 2466, 183 L. Ed. 2d at 421. On that basis, the Court imported the requirement of individualized sentencing from its death penalty jurisprudence, holding when the State imposes life without parole on a juvenile, it must take into consideration the defendant's age and its "hallmark features—among them, immaturity, impetuosity, and failure

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to appreciate risks and consequences." *Id.* at 2468, 183 L. Ed. 2d at 423. As a result, it held "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469, 183 L. Ed. 2d at 424.

Defendant contends the Supreme Court's holding in *Miller* is openended and may be extended to reach sentences of life with the possibility of parole. He urges us to adopt Chief Justice Roberts' reasoning in dissent that "[t]he principle behind [Miller] seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive." Miller, 132 S. Ct. at 2482, 183 L. Ed. 2d at 437-38 (Roberts, C.J., dissenting) (internal citations omitted). While the Court indeed draws a bright line distinction between sentencing adults and juveniles, its reasoning in Graham and Miller suggests an equally bright line between sentences that condemn a juvenile defendant to a life in prison without hope of redemption and sentences that provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75, 176 L. Ed. 2d at 846.

Miller and the line of cases leading to it conclusively establish that in certain circumstances, "children are different" in the same way that "death is different." Miller, 132 S. Ct. at 2470, 183 L. Ed. 2d at 425 (internal citations and quotation marks omitted). The Court's rulings make clear that the trial court must consider the juvenile defendant's relative inability to exercise self-control, as well as the limited applicability of legitimate penological justifications such as retribution to defendants with reduced moral agency. Nonetheless, the Court's holdings in Graham and Miller have been carefully circumscribed. In Graham, the Court instituted a categorical bar to sentences of life without parole, but only to the class of juvenile defendants who have committed nonhomicide offenses. In Miller, the Court's holding was narrower, barring only mandatory sentences of life without parole for juvenile offenders.

Moreover, the Court's holding in both *Miller* and *Graham* clearly rested upon its characterization of life without parole as the functional equivalent of the death penalty in juvenile cases. *Graham*, 560 U.S. at 69-70, 130 S. Ct. at 2027, 176 L. Ed. 2d at 842; *Miller*, 132 S. Ct. at 2466, 183 L. Ed. 2d at 421. To wit, the Miller court stated "*Graham*'s (and also *Roper*'s) foundational principle [was] that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 132 S. Ct. at 2466, 183 L. Ed. 2d at 421.

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However, the Court explicitly defined the "most severe penalties" in terms of capital punishment and life without parole. *Id.* ("Life-without-parole terms . . . share some characteristics with death sentences that are shared by *no other sentences.*") (quoting *Graham*, 560 U.S. at 69-70, 130 S. Ct. at 2027, 176 L. Ed. 2d at 842) (emphasis added). In doing so, the Court referred to "imprisoning an offender until he dies," the "lengthiest possible incarceration," and the "ultimate penalty for juveniles." *Id.* 

This connection between life without the possibility of parole and individualized sentencing has been borne out in both subsequent decisions by the United States Supreme Court and several state courts asked to interpret *Miller*. In *Montgomery v. Louisiana*, the Supreme Court held *Miller* had retroactive effect as a substantive rule of constitutional law and invalidated the sentence of a defendant sentenced in 1963 to life without parole at the age of seventeen. 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). Turning to a remedy, the Court held "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery*, 136 S. Ct. at 736, 193 L. Ed. 2d at 622.

As it has in other Eighth Amendment cases, the Court spoke approvingly of parole in *Montgomery*, stating that it "ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." Id. at 736, 193 L. Ed. 2d at 622. See also Rummel v. Estelle, 445 U.S. 263, 280-81, 63 L. Ed. 2d 382, 395 (1980) (upholding a mandatory sentence of life with parole imposed under Texas' "three-strikes" statute, noting the Court could "hardly ignore the possibility that [defendant] will not actually be imprisoned for the rest of his life."). The Court also cited to a Wyoming statute which, like the provision under which Defendant was sentenced, makes any juvenile defendant sentenced to life imprisonment eligible for parole after twenty-five years. Wyo. Stat. Ann. § 6-10-301(c) (2016). Thus, Montgomery suggests the Court views parole as an appropriate way to provide juvenile defendants with the required "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75, 176 L. Ed. 2d at 845-46.

The decisions of the state courts which have been asked to extend *Miller* beyond explicit sentences of life without parole similarly make clear the touchstone of the *Miller* analysis is whether the defendant is sentenced to a life term (or its functional equivalent) without an "opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* In *State v. Null*, the Iowa Supreme Court invalidated a

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mandatory 52.5 year sentence, noting that "geriatric release, if one is to be afforded the opportunity for release at all," does not provide the defendant a meaningful opportunity to regain his freedom and reenter society. 836 N.W.2d 41, 71 (Iowa 2013). Similarly, the Wyoming, Indiana, and California supreme courts have held *Miller* requires individualized sentencing where one or more mandatory minimum sentences results in a *de facto* life sentence without parole. *See, e.g., Bear Cloud v. State,* 334 P.3d 132, 142 (Wyo. 2012) (consecutive terms of twenty and twenty-five years provided defendant would not be eligible for parole until age sixty-one); *Brown v. State,* 10 N.E.3d 1, (Iowa 2014) (defendant sentenced to three consecutive terms adding up to one hundred and fifty years); *People v. Caballero,* 282 P.3d 291, 294-95 (Cal. 2012) (defendant sentenced to life with parole but was only eligible for release after serving one hundred and ten years of his term).

Defendant's sentence is neither an explicit nor a de facto term of life imprisonment without parole. Upon serving twenty-five years of his sentence, Defendant will become eligible for parole, where state law mandates he be given an opportunity to provide the Post-Release Supervision and Parole Commission with evidence of his maturity and rehabilitation. See N.C. Gen. Stat. § 15A-1371(b)(3) (2015) ("The Post-Release Supervision and Parole Commission must consider any information provided by [the prisoner] before consideration of parole.") (emphasis added). The Commission may only refuse him parole if it appears Defendant is a "substantial risk" to violate the conditions of his parole, his release would "unduly depreciate the seriousness of his crime or promote disrespect for law," his rehabilitation would be better served by remaining in prison, or he posed a substantial risk of recidivism.<sup>2</sup> N.C. Gen. Stat. § 15A-1371(d) (2015). Because "[plarole is intended to be a means of restoring offenders who are good social risks to society," its very purpose is to allow Defendant to demonstrate he has been rehabilitated and obtained sufficient maturity as to have overcome whatever age-related weaknesses in character that led to the commission of his crime. Jernigan v. State, 10 N.C. App. 562, 565, 179 S.E.2d 788. 790 (1971) (quoting Zerbst v. Kidwell, 304 U.S. 359, 363, 58 S. Ct. 872, 874, 82 L. Ed. 1399, 1401 (1938)).

Consequently, we conclude neither the United States Supreme Court nor the North Carolina Supreme Court has yet held the Eighth

<sup>2.</sup> The official commentary to the North Carolina General Statutes states "[t]he Commission intended that this be an exclusive list of legitimate bases for denying parole." N.C. Gen. Stat. § 15A-1371, cmt. (2015).

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Amendment requires the trial court to consider these mitigating factors before applying such a sentence to a juvenile defendant.<sup>3</sup> Because Defendant has failed to meet his burden of proving the statute is unconstitutional in all applications, we must presume the statute is constitutional and defer to the legislature, which has the exclusive authority to prescribe criminal punishments. *State v. Whitehead*, 365 N.C. 444, 446, 722 S.E.2d 492, 494 (2012). *See also Jernigan v. State*, 279 N.C. 556, 563-64, 184 S.E.2d 259, 265 (1971).

Nevertheless, we note there may indeed be a case in which a mandatory sentence of life with parole for a juvenile is disproportionate in light of a particular defendant's age and immaturity. That case is not now before us. Defendant chooses only to assert that N.C. Gen. Stat. § 15A-1340.19B(a)(1) fails to provide a trial judge with discretion to consider the mitigating factors of youth and immaturity. He does not show the existence of circumstances indicating the sentence is particularly cruel and unusual as-applied to him.

Because Defendant fails to meet the burden of a facial constitutional challenge and does not bring an as-applied challenge, the trial court's sentence is

AFFIRMED.

Judge DIETZ concurs.

Judge BRYANT concurs in result only in a separate opinion.

[2] 3. We would like to note Defendant declined to address whether his sentence violated the North Carolina Constitution. Unlike the United States Constitution's Eighth Amendment, Art. 1, Sec. 27 of the state constitution requires that courts not inflict "cruel or unusual punishments" (emphasis added). While our courts have historically applied the same analysis to both provisions, it is unclear "[w]hether the word 'unusual' has any qualitative meaning different from 'cruel' . . . . On the few occasions [the United States Supreme Court] has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn."  $State\ v.\ Green,\ 348\ N.C.\ 588,\ 603,\ 502\ S.E.2d\ 819,\ 828\ (1998)\ (quoting\ Trop\ v.\ Dulles,\ 356\ U.S.\ 86,\ 100,\ 2\ L.\ Ed.\ 2d\ 630,\ 642\ n.32\ (1958)).$ 

North Carolina remains the only state in the nation which permits juveniles as young as thirteen years old to be tried as adults without allowing them the ability to appeal for return to the juvenile system. Tamar Birkhead, North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform, 86 N.C.L. Rev. 1443, 1445 (2008). See also N.C. Gen. Stat. §§ 7B-2200, 7B-2203 (2015). Furthermore, the statute requires transfer for any Class A felony where the trial court finds probable cause. N.C. Gen. Stat. § 7B-2200 (2015). Because Defendant did not challenge this provision, its constitutionality is not before us and is a question we do not now decide.

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BRYANT, Judge, concurring in the result by separate opinion.

The majority undergoes a thorough constitutional analysis of what it interprets as a facial constitutional challenge as opposed to an applied one. I concur in the result reached by the majority but write separately to address the narrower issue raised by defendant in his appeal: whether the trial court had discretion under the statute to consider mitigating circumstances relating to a defendant's youth, community, and ability to benefit from rehabilitation, and impose an individualized sentence.

In this case, "[t]he jury rejected the theories of premeditation and deliberation and acting in concert, but convicted defendant based on the felony murder rule, with the underlying felony being assault with a deadly weapon inflicting serious injury." *State v. Jefferson*, No. COA13-668, 2014 WL 859345, at \*2 (N.C. Ct. App. Mar. 4, 2014) (unpublished). The question of whether the trial court has discretion in this matter was answered squarely by this Court in *State v. Lovette*, 225 N.C. App. 456, 737 S.E.2d 432 (2013) (*Lovette I*), where it set out sentencing requirements for defendants who are under the age of eighteen at the time of offense, following *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 183 L. Ed. 2d 407 (2012), and the enactment of N.C. Gen. Stat. §§ 15A-1340.19A and -1340.19B:

In response to the *Miller* decision, our General Assembly enacted N.C. Gen. Stat. § 15A-1476 et seq. ("the Act"), entitled "An act to amend the state sentencing laws to comply with the United States Supreme Court Decision in Miller v. Alabama." N.C. Sess. Law 2012-148. The Act applies to defendants convicted of first-degree murder who were under the age of eighteen at the time of the offense. N.C. Gen. Stat. § 15A-1340.19A. Section 15A-1340.19B(a) provides that if the defendant was convicted of first-degree murder solely on the basis of the felony murder rule, his sentence shall be life imprisonment with parole. N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2012). In all other cases, the trial court is directed to hold a hearing to consider any mitigating circumstances, inter alia, those related to the defendant's age at the time of the offense, immaturity, and ability to benefit from rehabilitation. N.C. Gen. Stat. §§ 15A-1340.19B, 15A-1340.19C.

Lovette I, 225 N.C. App. at 470, 737 S.E.2d at 441 (emphasis added) (footnotes omitted); see also State v. Lovette, \_\_\_ N.C. App. \_\_\_, \_\_\_, 758 S.E.2d 399, 405 (Lovette II) (holding that "the Court's prior opinion [in Lovette I] is the law of the case"), appeal dismissed, \_\_\_ N.C. \_\_\_, 763

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S.E.2d 392 (2014) (allowing defendant's motion to dismiss the appeal "for lack of substantial constitutional question filed by the State of NC"). In other words, where a defendant is convicted of first-degree murder under a theory other than the felony-murder rule, the defendant is entitled to a hearing regarding mitigating circumstances. See Lovette I, 225 N.C. App. at 470, 737 S.E.2d at 441.

In the instant case, defendant was fifteen years old at the time of the murder, and his conviction was based "solely" on the felony-murder rule. See Jefferson, 2014 WL 859345, at \*2. Accordingly, N.C.G.S. § 15A-1340.19B(a)(1) requires that defendant be sentenced to life imprisonment with parole. Id. § 15A-1340.19B(a)(1). In turn, N.C.G.S. § 15A-1340.19A defines "life imprisonment with parole" to mean that "defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole." Id. § 15A-1340.19A. As defendant was sentenced to life imprisonment with the possibility of parole in twenty-five years at the 29 February 2016 resentencing hearing, and this Court has previously held that N.C. Gen. Stat. §§ 15A-1340 and 15A-1340B comply with Miller, see State v. James, \_\_\_\_ N.C. App. \_\_\_\_, 786 S.E.2d 73, 78–79 (2016); State v. Pemberton, 228 N.C. App. 234, 247, 743 S.E.2d 719, 728 (2013), defendant's argument on appeal that his sentence fails to provide for sufficient discretion to consider mitigating factors is without merit. Accordingly, I concur in the result reached by the majority and affirm the trial court.

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STATE OF NORTH CAROLINA, v.
ALLEN DUANE PARLIER, DEFENDANT

No. COA16-724

Filed 7 March 2017

## 1. Confessions and Incriminating Statements—videotaped confession—not custodial

The videotaped confession of a defendant in a statutory rape and indecent liberties trial was admissible even though defendant contended that it was elicited in a custodial interrogation without *Miranda* warnings. There was no custodial interrogation; although any interview of a suspect by a police officer has been recognized to have coercive aspects, here there was neither a formal arrest nor a restraint on freedom of the degree associated with a formal arrest, and a reasonable person in this defendant's position would not have understood it to be a custodial interrogation.

# 2. Appeal and Error—preservation of issues—victim's sexual history

Defendant did not preserve for appellate review the question of the victim's past sexual history in a prosecution for statutory rape and indecent liberties where defendant did not make an offer of proof. Defendant made no application to the trial court for a determination of the relevance of the behavior about which he wished to question the victim and no hearing was held.

Appeal by defendant from judgment entered 7 January 2016 by Judge Yvonne Mims Evans in Caldwell County Superior Court. Heard in the Court of Appeals 26 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

Gillette Law Firm, PLLC, by Jeffrey William Gillette, for defendant-appellant.

BERGER, Judge.

On January 7, 2016, a Caldwell County jury convicted Allen Duane Parlier ("Defendant") of statutory rape and indecent liberties with a

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child. Defendant appeals, alleging these convictions should be reversed because his confession was obtained in violation of *Miranda*, and that he should have been allowed to interrogate the victim regarding her general sexual history contrary to the Rape Shield Law. We disagree.

## Factual Background

Caldwell County Detective Shelley Hartley was assigned to investigate a report from July 23, 2013, concerning an incident between Defendant and the parents of a 15-year-old girl, Cindy. When Cindy's parents discovered that the 41-year-old Defendant had been having sex with their daughter, Defendant fled to avoid a physical confrontation. Detective Hartley was unable to locate Defendant during her investigation, and advised Defendant's mother that she would like to speak with him.

On February 10, 2014, nearly seven months later, Defendant called Detective Hartley and left a voicemail message for her. Detective Hartley made contact with Defendant that same day, and she requested that he come speak with her at the Caldwell County Sheriff's Department. No warrant or other criminal process had been issued for Defendant, and no one from the Sheriff's Department transported him to meet Detective Hartley. Defendant traveled to the Sheriff's Department voluntarily.

Detective Hartley met Defendant in the Sheriff's Department lobby, identified herself, and advised that she was a detective. She was not dressed in a patrol uniform, but in plain clothes, and her weapon, although on her person, was not visible.

Detective Hartley requested that Defendant come talk with her, and Defendant followed her to an interview room. The two proceeded down a long hallway with at least two secure doors which prevented public access into the investigations division. The hallway doors were not locked and did not prevent egress from the Sheriff's Department. Defendant was not placed under arrest at that time, and he was never told that he was not free to leave. The door to the interview room was closed because of noise in the hallway, but it was not locked. Detective Hartley did not advise Defendant of his *Miranda* rights.

Detective Hartley and Defendant spoke for approximately 25 minutes in the interview room. During this time, Defendant never requested food or water, never requested an attorney, and never indicated that he was uncomfortable or needed a break. Further, Defendant never

<sup>1.</sup> The pseudonym "Cindy" has been used throughout to protect the identity of the juvenile victim pursuant to Rule 3.1(b) of the North Carolina Rules of Appellate Procedure.

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requested to leave the interview room. Prior to entering the interview room, Defendant only stated that he had been sick, but there was no evidence of illness or discomfort during the interview.

Defendant's interview with Detective Hartley was videotaped and later transcribed for use at trial. Defendant admitted that he and Cindy had sexual intercourse on six different occasions. Detective Hartley arrested Defendant at the conclusion of the interview.

Cindy testified at trial that the two began exchanging text messages of a sexual nature in June 2013. Initially, they met and kissed, but soon thereafter, Defendant went to Cindy's home and performed oral sex on her and then gave her marijuana. The following day, Cindy went to Defendant's mother's trailer home where they had sexual intercourse in his mother's room. Defendant's sexual relationship with the 15-year-old lasted until late July 2013, when Cindy's parents discovered the relationship and reported it to law enforcement.

During the investigation, Cindy told Detective Hartley that she could not remember how many times she and Defendant had sex, but it was at least one time per day, each weekday, from the end of June until July 22, 2013. During this time, Defendant provided Cindy with gifts and drugs. Cindy testified that she never wanted to tell anyone about the relationship because she "didn't want to disappoint him."

Cindy testified that she informed Defendant that she was 15 years old before they engaged in sexual activity. Defendant told Cindy that "he was risking a lot to do it with [her] and that, if he ever was caught, he would go to jail."

## Procedural Background

On May 6, 2014, Defendant was indicted by a grand jury in Caldwell County for the Class B1 felony of statutory rape of a 15-year-old child in violation of N.C. Gen. Stat.  $\S$  14-27.7A (2013), and the Class F felony of taking indecent liberties with a child in violation of N.C. Gen. Stat.  $\S$  14-202.1 (2013).

Prior to trial, the State filed a motion *in limine* to preclude inquiry into the sexual activity of the complainant, other than the acts at issue in the indictment, pursuant to N.C. Gen. Stat. § 8C-1, Rule 412. The trial court held this motion in abeyance prior to trial, but granted this motion during trial.

Defendant made an oral motion at the beginning of trial to suppress the videotaped interview of Defendant by Detective Hartley. This motion

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was made on the grounds that the interview was custodial interrogation and Defendant had not been given the warnings mandated by *Miranda*. Defendant did not file an affidavit with the trial court in support of his motion. The trial court heard testimony from Detective Hartley, and arguments from counsel for both the State and Defendant. At the conclusion of this hearing, the trial court made oral findings of fact, and denied the motion to suppress. At trial, Defendant objected to the admission of a transcript of the videotaped interview, but he did not object to the admission of the videotaped interview itself.

On January 7, 2016, the jury found Defendant guilty of both charged offenses. Defendant was sentenced in the presumptive range to a term of 270 to 384 months imprisonment. Defendant timely filed notice of appeal.

## Analysis

## A. Non-Custodial Interrogation

[1] Defendant first contends that his February 10, 2014 videotaped confession was inadmissible at trial because it was elicited during a custodial interrogation and he was not given *Miranda* warnings prior to making his statement to Detective Hartley. For these reasons, Defendant argues that the trial court erred in denying his motion to suppress this evidence and allowing its admission during trial. We disagree.

In reviewing the trial court's denial of a motion to suppress, "the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence....' "State v. Barden, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (quoting State v. Eason, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994)). However, "the trial court's determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law, which is fully reviewable on appeal." State v. Buchanan, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citation omitted). "The trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." Id. (citations and quotation marks omitted).

We must first note that Defendant failed to object to the admission of the videotaped interview into evidence at trial. "[O]ur Supreme Court has held that a trial court's evidentiary ruling on a pretrial motion to suppress is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Hargett*, \_\_\_\_, N.C. App. \_\_\_\_, \_\_\_, 772 S.E.2d 115, 120 (2015) (citations and quotation marks omitted) (emphasis in original). "Unpreserved error in

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criminal cases . . . is reviewed only for plain error." State v. Lawrence, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citing N.C. R. App. P. 10(a)(4); State v. Black, 308 N.C. 736, 739-41, 303 S.E.2d 804, 805-07 (1983)). Plain error is to be "applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused." State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation, quotation marks, and brackets omitted) (emphasis in original). Defendant bears this heavier burden of showing that the error rises to the level of plain error. Lawrence, 365 N.C. at 516, 723 S.E.2d at 333.

In now turning to the alleged error, we begin with the Fifth Amendment to the United States Constitution, which provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. In *Miranda v. Arizona*, 384 U.S. 436 (1966), "the United States Supreme Court determined that the prohibition against self-incrimination requires that prior to a custodial interrogation, the alleged defendant must be advised that he has the right to remain silent and the right to the presence of an attorney." *State v. Warren*, 348 N.C. 80, 97, 499 S.E.2d 431, 440 (1998) (citing *Miranda*, 384 U.S. at 479). However, "[t]he rule in *Miranda* applies only when a defendant is subjected to custodial interrogation." *State v. Hipps*, 348 N.C. 377, 396, 501 S.E.2d 625, 637 (1998) (citation omitted).

In determining whether a suspect is in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. This is an objective test, based upon a reasonable person standard, and is to be applied on a case-by-case basis considering all the facts and circumstances.

*State v. Rooks*, 196 N.C. App. 147, 150, 674 S.E.2d 738, 740-41 (2009) (citations, quotation marks, and brackets omitted).

Any interview of a suspect by a police officer has been recognized by the United States Supreme Court to have coercive aspects to it. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). However, the United States Supreme Court has also recognized that *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police

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suspect." *Id.* at 495. Our inquiry on appellate review is whether there were indicia of formal arrest such that the questioning becomes custodial interrogation. *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 827-28.

In the case *sub judice*, the uncontroverted facts found by the trial court during the suppression motion hearing were that

[t]he defendant called Detective Hartley. She told him she would like to have him come in. He said he would come that same day. And in fact, he did report to the Caldwell County Sheriff's [Department]. He was not told upon his arrival that he was under arrest or in custody, but he was not told that he was free to leave. He indicated that he was feeling sick to his stomach, but he voluntarily walked into the interview room, and he talked with Detective Hartley for approximately 42 minutes. He answered her questions. He never requested an attorney. He did not ask if he was free to leave. He didn't ask if he was under arrest. He did not request water or use of a restroom. He was not handcuffed or shackled.

Looking at the circumstances surrounding Defendant's videotaped interview, there was neither a formal arrest nor a restraint on freedom of movement of the degree associated with a formal arrest. Here, Defendant contacted Detective Hartley and voluntarily traveled to the Caldwell County Sheriff's Department. Detective Hartley invited Defendant to speak with her and he followed her to the interview room. Defendant was not handcuffed or restrained in any way, and the interview room door and hallway doors were not locked. Defendant neither asked to leave, nor expressed any reservations about speaking with Detective Hartley. Furthermore, a reasonable person in the Defendant's position would not have understood this to be custodial interrogation because there were no indicia of a formal arrest.

In *State v. Jones*, 153 N.C. App. 358, 570 S.E.2d 128 (2002), "this Court affirmed the trial court's determination that defendant was not in custody where the defendant voluntarily accompanied police officers to the police department for an interview, was not handcuffed, was told he was not under arrest, was offered the use of the bathroom, no threats or promises were made, and defendant was left unattended while the interviewing officers took a break." *Rooks*, 196 N.C. App. at 150-51, 674 S.E.2d at 741 (citing *Jones*, 153 N.C. App. at 365-66, 570 S.E.2d at 134). While some of the factors noted in *Jones* were not present in this case, such as the offer to use the bathroom and informing the defendant that

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he was not under arrest, these are not sufficient to convert Defendant's questioning into custodial interrogation when reviewing all of the circumstances present in this case, especially when reviewing this contention of error for plain error. Therefore, the trial court did not err in its denial of Defendant's suppression motion because the videotaped interview of Defendant was a voluntary statement, not the result of custodial interrogation to which *Miranda* would apply. This contention of error is overruled.

# B. Rule 412: Relevance of Past Sexual Conduct of Complainant

[2] Defendant contends in his second and final assignment of error that the trial court erred by denying his request to question Cindy about her prior general sexual history. Defendant argues that because Cindy's medical injuries corroborated her accusations against Defendant, her sexual history provided an alternative explanation for the medical evidence and was beyond the protections of North Carolina's Rape Shield Law. We disagree.

"While a defendant clearly is entitled to cross-examine an adverse witness, the scope of that cross-examination lies within the 'sound discretion of the trial court, and its rulings thereon will not be disturbed absent a showing of abuse of discretion.' "State v. Dorton, 172 N.C. App. 759, 766, 617 S.E.2d 97, 102 (2005) (quoting State v. Herring, 322 N.C. 733, 743-44, 370 S.E.2d 363, 370 (1988)). "When cross-examination involves the sexual behavior of the complainant, our Rape Shield Statute further limits the scope of cross-examination by declaring such examination to be irrelevant to any issue in the prosecution except in four very narrow situations." *Id.* (citations and internal quotation marks omitted).

This state's Rape Shield Statute is embodied in North Carolina Rules of Evidence, Rule 412(b), which provides:

- (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
  - Was between the complainant and the defendant; or
  - (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

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- (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
- (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

Without a determination by the court that the sexual behavior is relevant under Rule 412(b), no such evidence may be introduced in any trial of a charge of rape or a sex offense. N.C. R. Evid. 412(d).<sup>2</sup> Before the defense can make such an offer of proof to allow the trial court to make this determination, as the proponent of the evidence, the Defendant

shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A–952, or during the trial at the time when the proponent desires to introduce such evidence. When application is made, the court shall conduct an in camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence.

<sup>2.</sup> This Court has also held that "there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute." State v. Martin, \_\_\_\_ N.C. App. \_\_\_\_, \_\_\_, 774 S.E.2d 330, 335 (2015). For example, in Martin, we ruled that the trial court had erred in refusing to admit evidence that the defendant, a football coach convicted of sexually assaulting a minor, had caught the minor engaging in sexual acts in a locker room even though the evidence did not fall within one of the four exceptions contained in the Rape Shield Law. Our holding was based on the fact that his defense to the charges against him "was that he did not engage in any sexual behavior with [the minor] but that [she] fabricated the story to hide the fact that defendant caught her performing oral sex on the football players in the locker room." Id. at \_\_\_\_, 774 S.E.2d at 336. However, in the present case Defendant has not presented evidence that would trigger the rule discussed in Martin.

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State v. Mason, 315 N.C. 724, 728-29, 340 S.E.2d 430, 433 (1986) (citing N.C. R. Evid. 412). Here, Defendant made no application to the court for a determination of the relevance of the sexual behavior about which Defendant wished to question Cindy. Consequently, the trial court did not conduct an *in camera* hearing on the issue. Thus, Defendant failed to establish the admissibility of evidence of the complainant's past sexual behavior.

Our Supreme Court has held that:

[i]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. We also held that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

State v. Raines, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007) (citations and quotation marks omitted). "In the absence of an adequate offer of proof, we can only speculate as to what the witness' answer would have been." State v. Barton, 335 N.C. 741, 749, 441 S.E.2d 306, 310-11 (1994) (citation, quotation marks, and brackets omitted). "It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." State v. Johnson, 340 N.C. 32, 49, 455 S.E.2d 644, 653 (1995) (citation and quotation marks omitted).

Because Defendant did not make an offer of proof to show what Cindy's response to questions about her past sexual behavior would have been, he has failed to preserve this issue for appellate review. Any attempt by this Court to presume the substance or prejudicial effect of the excluded evidence would be speculation. This assignment of error is therefore overruled.

## Conclusion

Having considered and rejected all of Defendant's assignments of error, and after a thorough and careful review of the record, transcripts, and briefs, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

[252 N.C. App. 194 (2017)]

STATE OF NORTH CAROLINA
v.
ARTHIANDO LUREZ PHILLIPS

No. COA16-601

Filed 7 March 2017

# False Pretense—attempt—sale of counterfeit handbag—undercover buy

The State presented sufficient evidence that defendant attempted to obtain property by false pretenses in a prosecution that arose from a detective seeing a Facebook posting to sell expensive pocketbooks of a brand which was being stolen from an outlet store; an undercover operation resulted in the purchase of one of the bags; and the bag turned out to be counterfeit. Defendant's advertising and holding out the items as a particular brand even though he knew they were counterfeit (established in part by selling the bags at a fraction of their worth if genuine), established intent by defendant to deceive buyers.

Appeal by defendant from judgment entered 15 December 2015 by Judge Gregory R. Hayes in Cleveland County Superior Court. Heard in the Court of Appeals 24 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly S. Murrell, for the State.

Kimberly P. Hoppin for defendant-appellant.

BRYANT, Judge.

Where defendant intended to deceive the buyer but fell short of the completed offense of obtaining property by false pretenses as the undercover officer was not deceived at the time of the sale, the trial court did not err in denying defendant's motion to dismiss the charge of attempting to obtain property by false pretenses.

On 17 March 2014, Detective Micah Sturgis with the Cleveland County Sheriff's Office attended a meeting with members from multiple nearby police departments and sheriffs' offices. At the meeting, officers with the Gaffney Police Department reported that several items of Michael Kors inventory, including "purses, pocketbooks, [and] backpacks," were being stolen from the Michael Kors Outlet store in Gaffney.

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A week later, Detective Sturgis was on his personal Facebook page when he noticed a posting for Michael Kors backpacks for sale on a website called "One Man's Junk," which he described as an online "flea market." The backpacks, with accompanying photographs, were captioned "Michael Kors Backpacks Startin' at 45," and were listed for sale on the site by an individual named R.D. Phillips. This name caught Detective Sturgis's eye because he was familiar with an individual named Arthiando Phillips, the defendant. Because of the reported larcenies of multiple Michael Kors items from the Gaffney store, Detective Sturgis decided to investigate further.

Using a fake name and address, Detective Sturgis created a fake Facebook account and started a conversation with R.D. Phillips, who was later determined to be defendant, in order to discuss the purchase of the Michael Kors backpacks. Detective Sturgis asked, "[c]an you send me pics of the bags you've got or can you get up with me tomorrow morning sometime?" Defendant replied that he could "get anything from shades to shoes, the MK watches and all." Detective Sturgis requested to meet defendant in Shelby at 11:00 a.m. the next morning, 25 March 2014, and defendant agreed to the meeting and provided his phone number.

Detective Sturgis then contacted Sergeant Fitch, a supervisor with the Cleveland County Sheriff's Office, and the two decided to set up an undercover purchase from defendant for one of the Michael Kors bags in order to determine whether it was (1) one of the stolen Michael Kors bags from the outlet in Gaffney, or (2) counterfeit merchandise. Detective Sturgis enlisted Sergeant Fitch's help to set up the undercover purchase because Sergeant Fitch was more familiar and experienced with undercover buy operations of illegal purchases.

On 25 March 2014, Detective Sturgis called defendant and told him his "business partner Tim" (Sergeant Fitch) would be meeting him. Sergeant Fitch then called defendant to set up the time, date, and location of the meeting for the undercover purchase, and recorded the call. Sergeant Fitch took \$50.00 from the sheriff's office special funds account and met defendant at the Walmart on Highway 74 in Shelby. Defendant brought two Michael Kors bags to the meeting, and Sergeant Fitch ultimately purchased one of the bags for \$35.00. Defendant never indicated whether the bags were authentic or counterfeit, but according to Detective Sturgis, defendant "used the words 'Michael Kors' and showed a tag on the pocketbook or the book bag as a Michael Kors tag" in his Facebook post. Afterwards, Sergeant Fitch delivered the bag to Detective Sturgis and later testified that he "knew something was not right, to sell a \$400 pocketbook for \$45."

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Thereafter, Detective Sturgis contacted counterfeit expert Wayne Grooms, stating

[b]ased off of looking at the pocketbook, there were some things about the pocketbook that made me believe the pocketbook was a counterfeit pocketbook instead of a true Michael Kors pocketbook. I had worked with Wayne Grooms and the U.S. Customs in a couple of other investigations where we had gotten some counterfeit goods, and there's some telltale signs that I had picked up from other investigations to be able to determine that this one was probably a counterfeit pocketbook at that point. So I wanted Investigator Grooms to take a look at it to verify what I thought.

On 1 April 2014, Investigator Grooms spoke with Detective Sturgis regarding the authenticity of the Michael Kors bag, which he determined to be not authentic, based on his experience as a Charlotte-Mecklenburg police officer who had been involved in over 10,000 trademark investigations and been sworn as an expert on counterfeit merchandise in both federal and state courts. The same day, Detective Sturgis met with other officers and planned to meet defendant in the Walmart parking lot for the purchase of additional counterfeit goods. However, defendant did not answer the officers' calls or respond to texts, and so officers went to defendant's residence and conducted a search of the home.

At defendant's residence, the officers found "other counterfeit goods located inside the residence, but it appeared that they were for personal use and not for redistribution." During the search, officers also found and seized seven illegal "poker style" video gambling machines in an outbuilding warehoused on the property. Additionally, defendant indicated to Special Agent Brian Bowes with U.S. Customs, that he purchases "counterfeit merchandise" from a warehouse on Old National Highway in Atlanta, Georgia called The Discount Mall. Detective Sturgis passed this information along to authorities in Georgia and U.S. Customs.

Defendant was arrested and charged with obtaining property by false pretenses and possessing five or more video gaming machines. On 8 September 2014, defendant was indicted by a Cleveland County grand jury for the same. The cases were consolidated and tried by a jury during the 14 December 2015 Criminal Session of the Superior Court of Cleveland County, the Honorable Gregory R. Hayes, Judge presiding. Defendant entered a plea of not guilty to both charges.

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Following the close of the State's evidence, defendant moved to dismiss all charges against him due to insufficient evidence. The trial court denied the motion. Defendant did not present any evidence at trial.

On 15 December 2015, the jury returned a verdict of guilty of attempting to obtain property by false pretenses and a verdict of not guilty of possession five or more video gaming machines. The trial court entered judgment the same day, committing defendant to the custody of the North Carolina Department of Correction for a term of eleven to twenty-three months. Defendant filed written notice of appeal.

On appeal, defendant contends the trial court committed reversible error by denying defendant's motion to dismiss the charge where the evidence was insufficient to support the conviction for attempting to obtain property by false pretenses. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192–93, 451 S.E.2d 211, 223 (1994) (citing *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986)).

Defendant was charged and convicted of obtaining property by false pretenses. Pursuant to N.C. Gen. Stat. § 14-100, our Supreme Court has defined this offense as "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Childers*, 80 N.C. App. 236, 242, 341 S.E.2d 760, 764 (1986) (quoting *State v. Cronin*, 299 N.C. 229, 262 S.E.2d 277, 286 (1980)); *see* N.C.G.S. § 14-100 (2015). A key element of the offense is that "an intentionally false and deceptive representation of a fact or event has been made." *State v. Kelly*, 75 N.C. App. 461, 464, 331 S.E.2d 227, 230 (1985).

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When a defendant is charged with the completed offense of obtaining property by false pretenses, proof that the victim was indeed deceived at the time of the offense is required. See State v. Simpson, 159 N.C. App. 435, 539, 583 S.E.2d 714, 716-17 (2003). However, this Court has previously held that actual deceit is not an element of the crime of attempting to obtain property by false pretenses. See State v. Wilburn, 57 N.C. App. 40, 46, 290 S.E.2d 782, 786 (1982) ("It is not necessary in order to establish an intent, that the prosecutor should have been deceived, or should have relied on the false pretenses and have parted with his property ...." (citations omitted)); see also State v. Dawson, No. COA15-420, 2015 WL 7729662, at \*2–4 (N.C. Ct. App. Dec. 1, 2015) (unpublished) (finding no error in the trial court's denial of the defendant's motion to dismiss "where neither clerk was deceived by the counterfeit \$100.00 bills and did not part with any property in exchange for [them]," as the evidence was sufficient to show the defendant's attempt to obtain property by false pretenses, a crime for which "actual deceit" is not required). Indeed, for attempt crimes, the two elements required are (1) "the intent to commit the substantive offense" and (2) "an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense." State v. Smith, 300 N.C. 71, 79, 265 S.E.2d 164, 169–70 (1980) (citations omitted).

Defendant argues that the evidence fails to establish a false pretense or intent to deceive because defendant did not "actually represent that the bag he offered for sale was an authentic Michael Kors bag." We disagree.

In the instant case, the evidence shows that defendant advertised Michael Kors bags for sale for \$45.00 on a website titled "One Man's Junk." In his statements to Detective Sturgis on Facebook, defendant described one bag as a "Michael Kors bag with tags," and included photographs. The evidence in the record also shows that defendant originally purchased the bags from a warehouse in Atlanta ("The Discount Mall"), and sold the bags for only a fraction of their worth, which also helps to establish that defendant knew the merchandise was counterfeit. Sergeant Fitch testified that he made an undercover purchase of one of the bags, paying defendant \$35.00, at the behest of Detective Sturgis. Evidence in the record also supports the fact that Detective Sturgis and Sergeant Fitch were suspicious and had knowledge that the bags sold by defendant, including the one Sergeant Fitch purchased, were likely counterfeit. Indeed, Wayne Grooms, the owner of a private investigative firm that specializes in intellectual property investigations dealing with counterfeit merchandise testified at trial that the Michael Kors bag

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at issue in this case was "not a genuine handbag": "The label is totally wrong. The way the "MK" is put on the label is wrong. The way the label is attached to the handbag is wrong. The zippers are wrong. The circles are wrong. The material of the pocketbook is wrong."

Thus, defendant's act of advertising and holding the items out as a particular brand (Michael Kors), even though he knew the merchandise was counterfeit, establishes intent on the part of defendant to deceive undercover officers and other potential buyers. *See id.* Thus, viewing the evidence in the light most favorable to the State, defendant had the requisite intent to cheat or defraud, an action which was calculated to deceive buyers, and the trial court properly denied defendant's motion to dismiss.

With regard to the second element of the attempt offense (overt act), however, defendant, relying on this Court's opinion in *State v. Wilburn*, argues that "where the evidence presented by the State . . . showed a completed offense, then the evidence [is] insufficient to support a conviction for the attempt[,]" and therefore, his conviction should be vacated. See 57 N.C. App. at 46, 290 S.E.2d at 786 (citations omitted). Defendant misconstrues the law as stated in *Wilburn*.

In Wilburn, this Court held that "if property is actually obtained in consequence of the prosecut/ing party's/ reliance on the false pretenses, the offense is complete and an indictment for an attempt will not lie." Id. (emphasis added) (citations omitted). However, here, the property was not obtained "in consequence" of Sergeant Fitch's "reliance on the false pretense." Instead, the property was obtained as a part of an undercover operation, and the record supports the conclusion that the officers involved in the operation were suspicious and had knowledge that the bag was likely counterfeit. Thus, because Sergeant Fitch was never deceived by defendant's misrepresentation that the bag was an authentic Michael Kors brand bag, the crime was not complete at the time of the sale. Therefore, while the officer did complete the purchase of the counterfeit bag for the purpose of the undercover operation, the officer was never deceived because he did not rely on defendant's false representation, and defendant was only guilty of attempting to obtain property by false pretenses.

Accordingly, where there was substantial record evidence to support that defendant intended to deceive the buyer but fell short of the completed offense because Sergeant Fitch was not deceived at the time of the sale, the State presented sufficient evidence to establish that

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defendant attempted to obtain property by false pretenses, and the trial court did not err in denying defendant's motion to dismiss.

NO ERROR.

Judges HUNTER, JR., and DIETZ concur.

STATE OF NORTH CAROLINA v. HERBERT LEE STROUD

> No. COA16-59 Filed 7 March 2017

# 1. Appeal and Error—preservation of issues—motion to dismiss

Defendant preserved for appellate review the contention that the trial court erred by not dismissing some of the charges against him for insufficient evidence where defendant had conceded that there was sufficient evidence to go to the jury on felony murder but subsequently moved "to set aside the verdict for lack of evidence and for legal errors." The Court of Appeals interpreted this as a motion to dismiss pursuant to N.C.G.S. § 15A-1227(a)(3), made as to all of the convictions against him.

## 2. Robbery—sufficiency of evidence—circumstantial

The State presented substantial evidence to allow the jury to draw a reasonable inference that defendant was the perpetrator of a robbery with a dangerous weapon and larceny. Circumstantial evidence is all that a jury needs to deny a defendant's motion to dismiss, and it is then for the jury to resolve conflicts in the evidence.

## 3. Appeal and Error—plain error—evidentiary issue

Evidence concerning defendant's attempts to hire counsel prior to his arrest was reviewed for plain error where defendant did not object at trial. Where an alleged constitutional error occurs during either jury instructions or on evidentiary issues, an appellate court must review for plain error if it is specifically and distinctly contended.

# 4. Constitutional Law—plans to hire lawyer—pre-arrest

There was no plain error where two witnesses testified about defendant's plans to hire a lawyer before he was arrested, given the

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passing nature of the comments, the lack of emphasis or detailed discussion of the comments by the prosecutor, and the voluminous amount of other testimony and evidence.

# 5. Sentencing—felony murder—underlying felonies

A sentence for first-degree felony murder was not disturbed, but judgments for robbery with a dangerous weapon and larceny were arrested, and a conviction for possession of stolen goods was vacated without remand. When a defendant is convicted of felony murder, the underlying conviction merges into the felony conviction, and the trial court erred by failing to arrest judgment on defendant's conviction for robbery with a dangerous weapon. The other felony convictions in this case were not required to be arrested because all three felonies were related to the same event and were not separate convictions. Remand was not needed.

Appeal by Defendant from judgments entered 1 May 2015 by Judge W. Allen Cobb Jr. in Superior Court, Duplin County. Heard in the Court of Appeals 22 August 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for Defendant.

McGEE, Chief Judge.

Herbert Lee Stroud ("Defendant") appeals from judgments entered after a jury found him guilty of first-degree felony murder, larceny, robbery with a dangerous weapon, and possession of stolen goods.

## I. Background

The body of Henry Lionel Bouyer, Jr. ("Bouyer") was discovered in a shallow ditch on the side of Carrolls Road in Warsaw, North Carolina, in the early morning hours of 21 August 2012. Dr. Anuradha Arcot ("Dr. Arcot"), the forensic pathologist who performed the autopsy, testified Bouyer died from three shots fired from a shotgun at close range – one to his neck, a second to his back, and a third near his groin. Dr. Arcot was unable to determine a specific time of death, and could only say that Bouyer died sometime within the twenty-four hours prior to the discovery of his body. The State presented a timeline of the events surrounding Bouyer's death.

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A few days prior to the discovery of Bouyer's body, Defendant and his stepson, Jeremy Stephens ("Stephens"), visited the home of Travis Jones ("Jones"), a mechanic. Defendant and Stephens asked Jones what alterations he could make to the appearance of a motorcycle. Jones replied that if he was provided the necessary parts and was paid for his labor, he could make any modifications they desired. Defendant and Stephens did not have a motorcycle with them on that day.

Around 6:00 p.m. on 20 August 2012, Bouyer drove his motorcycle to a BP station in Warsaw to buy a lottery ticket. Bouyer's motorcycle, a Suzuki GSXR 1000, was a distinctive black and yellow color with a Joker emblem painted on its side. From the BP station, Bouyer drove to a barbershop for a haircut, arriving around 6:45 p.m. While receiving his haircut, Bouyer made and received between five and ten phone calls, annoying his barber and friend, Martin Batts ("Batts"). Bouyer paid Batts with cash from his wallet, and left on his motorcycle between 7:15 p.m. and 7:30 p.m.

Bouyer was next seen at the Small Towns Convenience Mart ("Small Towns") in nearby Magnolia, North Carolina. Ivey Chestnutt ("Chestnutt"), a clerk at Small Towns, saw Bouyer enter the store around 7:30 p.m. Chestnutt and Bouyer began a conversation, during which Bouyer received a number of phone calls. After finishing one of his phone calls, Bouyer told Chestnutt he had "a guy that wants to buy my motorcycle." Bouyer explained that he "ran it out to him for a couple days, and right now he wants to keep bugging me, wanting [me] to rent the motorcycle out to him or wanting to buy it." Bouyer added that if the unnamed person would pay him \$5,000.00, he would sell that person the motorcycle. Bouyer received one more phone call, said goodbye to Chestnutt, and left.

Bouyer rode his motorcycle back to the BP station in Warsaw to meet with Defendant and Stephens. Dedra McGowan ("McGowan"), a clerk at the BP station, saw Bouyer enter the BP station first, followed by the Defendant shortly thereafter. After speaking inside the BP station for only a moment, Bouyer and Defendant left the station and continued talking in the parking lot with Bouyer sitting on his motorcycle, and Defendant and Stephens sitting in Defendant's Jeep Cherokee ("the Jeep"). McGowan testified that the three "looked comfortable," and "looked like they knew each other already." Surveillance footage from the BP station confirmed McGowan's testimony, showing Bouyer and Defendant inside the BP station for a short period of time, and also Bouyer, Defendant, and Stephens talking in the parking lot for about four minutes. Following this conversation, Defendant and Stephens

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left the parking lot at 8:59 p.m. in Defendant's Jeep, and Bouyer headed in the same direction on his motorcycle seventeen seconds later. No testimony presented at trial tended to show Bouyer's whereabouts after 8:59 p.m. on 20 August 2012.

That same night, Defendant visited the home of his friend, Ellie Graham ("Graham"), in Rose Hill, North Carolina. Graham initially testified that "it was a little after 9:00 [p.m.] when [Defendant] came to my house[,]" but later testified that Defendant arrived "somewhere between 9:00 [p.m.] and 11:00 [p.m.]" Graham testified that during a thirty minute visit, Defendant "wasn't himself that day" because he was crying, and was generally distraught about marital problems he was having with his wife. Graham testified that other than Defendant having red eyes associated with crying, he did not notice anything different about Defendant's physical appearance. Graham testified that Defendant was alone, and that Defendant stated he needed to borrow some money so he could pick Stephens up from work that night.

The following day, Defendant and Stephens returned to Jones' house around 4:00 p.m. with a motorcycle, later identified as Bouyer's. Defendant and Stephens told Jones they would like the motorcycle to be stretched out and lowered, and would like a mural to be painted on its side. Jones told them that he could not start work on the motorcycle until they either purchased the required parts or paid him so he could order the parts himself. Defendant and Stephens did not have any money with them at the time, so the motorcycle was parked in a field adjacent to Jones' house.

A few days later, Defendant and Stephens returned to Jones' house to ask whether he could sell the bike or otherwise "get rid of it for them." Jones responded that he would be unable to find a buyer without the proper paperwork, but if he was provided with the title to the motorcycle, he would attempt to find a buyer. During that visit, Jones asked Defendant and Stephens whether they "finally [got their] money problem straightened out." Jones testified that Defendant responded "that any problem that they had, any money – any problem that they had had been taken care of, and then [Defendant] looked at [Stephens], and [Stephens] smiled, and that was the end of that conversation."

# A. Law Enforcement Investigation

Bouyer's body was discovered the morning of 21 August 2012 around 7:30 a.m. Among the evidence collected at the scene by law enforcement was: a motorcycle helmet, later identified as Bouyer's; a broken cell phone; a pear; and a spent 9-millimeter shell casing, found

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one hundred yards from the body. Deputy George Garner ("Deputy Garner"), of the Duplin County Sheriff's Office, was asked to assist in identifying the phone number for the phone that was found at the scene. After identifying the phone number, a subpoena was issued for the subscriber information on the number, which in turn allowed Deputy Garner to determine that the phone belonged to Bouyer. The Duplin County Sheriff's Office also requested and received cell phone records of Defendant and Stephens, among others.

Records from the cell phones of Defendant, Stephens, and Bouyer provided information regarding phone calls and text messages between Stephens and Bouyer, and the relative locations of the three phones on the night of 20 August 2012. First, the call detail records from the phones of Bouyer, Stephens, and Defendant confirmed that many of the phone calls Bouyer placed and received on 20 August 2012 were to and from the cell phone number identified as belonging to Stephens. That day, Bouyer called Stephens four times, and Stephens called Bouyer eleven times. The call detail records show that Defendant's phone was never used to call, and did not receive a call from, Bouyer's phone on 20 August 2012.

Next, the text detail records show multiple text messages between Stephens and Bouyer regarding, presumably, the purchase of Bouyer's motorcycle. Stephens texted Bouyer at 7:29 p.m. on 20 August 2012 that they would "[m]eet . . . at Small Towns," and two minutes later, texted Bouyer that "[w]e are buying it today, ill [sic] let u [sic] use my card [sic] to get back tour [sic] crib." The call detail records also show that Defendant's phone was never used to send a message to, nor did it ever receive a message from, Bouyer's phone.

Finally, the call detail records, through the use of historical cell site analysis, also provided some evidence of the relative location of the phones of Bouyer, Defendant, and Stephens on the night of 20 August 2012. At trial, Agent William Williams ("Agent Williams"), of the Federal Bureau of Investigation, testified that the last two phone calls made to Bouyer's phone that resulted in location data being collected were made at 8:20 p.m. and 8:36 p.m. on 20 August 2012. When those calls were received, Bouyer's cell phone utilized a specific cell tower and sector: tower 4c4, sector 2. Agent Williams testified that both the BP station and Bouyer's residence were within the "footprint" of tower 4c4, sector 2, meaning calls made from those locations would likely be routed through that tower and sector. Regarding Stephens' phone, Agent Williams testified that at 8:36 p.m. and 8:39 p.m. on 20 August 2012, Stephens' phone utilized that same tower and sector, which indicated that his phone and

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Bouyer's phone "would have been within the footprint of this particular tower," meaning that they "were relatively close together." Stephens' phone then utilized the same tower, but a different sector, sector 3, five times on 20 August 2012, at 9:15 p.m., 9:17 p.m., 9:19 p.m., 9:20 p.m., and 9:55 p.m. According to Agent Williams, tower 4c4, sector 3 was significant because it was the sector in which Bouyer's body was discovered the next morning.

Regarding Defendant's phone, Agent Williams testified that it utilized tower 4c4, sector 1 four times between 9:39 p.m. and 9:48 p.m. Three of those calls – at 9:43 p.m., 9:45 p.m., and 9:48 p.m. – were between Stephens' and Defendant's phones. Agent Williams explained that tower 4c4, sector 1, "points" to the northeast, towards Warsaw. Defendant's phone then utilized a different tower, tower 4bf, sector 1, near Rose Hill, at 11:04 p.m. Though Defendant's phone made and received a total of eighty-nine calls on 20 August 2012, it never utilized tower 4c4, sector 3 on that date.

Lieutenant Michael Stevens ("Lt. Stevens"), an investigator with the Duplin County Sheriff's Office, retrieved the security footage from the BP station. Lt. Stevens, who was a friend of Bouyer, knew Bouyer worked as a truck driver and would often park his truck in the BP station parking lot when it was not in use. While at the BP station retrieving the surveillance footage, Lt. Stevens noticed Bouyer's truck in the parking lot. In searching the truck, the title to Bouyer's Suzuki motorcycle was located.

After reviewing the call detail records and viewing the BP surveillance footage, law enforcement deemed Stephens a suspect and began surveillance of him on 24 August 2012. During the surveillance, officers observed Stephens leave the Subway restaurant in Rose Hill, North Carolina where he worked, in Defendant's Jeep. Following him from the Subway, officers observed Defendant and Stephens make stops at several locations, and eventually followed the pair to Jones' residence. As a result of the surveillance, law enforcement seized Bouyer's motorcycle from the field adjacent to Jones' residence.

Law enforcement obtained a warrant to search Defendant's Jeep on 28 August 2012. From the Jeep, law enforcement retrieved a wallet, found underneath the center console of the vehicle. The wallet contained Bouyer's North Carolina registration card identifying him as the owner of a Suzuki motorcycle. Subsequent forensic testing revealed Defendant's DNA on the wallet. Law enforcement also found a bag containing a pear in the back cargo area of the Jeep.

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The same day, law enforcement also obtained and executed a search warrant on Defendant's home, where both he and Stephens lived. In Stephens' bedroom, law enforcement recovered a motorcycle helmet, in which subsequent testing revealed the presence of Stephens' DNA, but not Defendant's or Bouyer's. At the time the search was executed, Defendant's bedroom door was locked and had to be forced open. In Defendant's bedroom, law enforcement discovered a Lorcin 9-millimeter handgun hidden inside the frame of an electric heater, along with a box of 9-millimeter bullets. A credit card belonging to Stephens was found in Defendant's closet, indicating that both Defendant and Stephens "seemed to occupy that residence" and had regular access to the entire house. Subsequent forensics testing confirmed that the 9-millimeter shell casing found one hundred yards from Bouyer's body had been fired from the 9-millimeter handgun found hidden in Defendant's bedroom. Police also found shotgun shell wadding in the backyard of the residence, and a pear tree in the backyard of the adjoining residence. No shotgun was recovered from Defendant's and Stephens' residence.

Items seized from both Defendant's car and home, including a pair of Stephen's shoes; a pair of Defendant's shoes; a pair of Defendant's pants; the front and rear floor mats from Defendant's Jeep; the rear cargo floor lining from Defendant's Jeep; a pair of gloves; and a black trash bag, among others, were sent to the North Carolina State Crime Lab for testing. None of the items seized from Defendant or Stephens tested positive for the presence of blood. Based on the evidence collected throughout the investigation, a warrant for Defendant's arrest was issued 7 September 2012.

#### B. Indictment and Trial

Defendant was indicted by a grand jury on 6 October 2014, and his trial began on 20 April 2015. At trial, the State presented the testimony of thirty-seven witnesses over a span of six days. At the conclusion of the State's case, Defendant's counsel made the following motion:

[Defendant's Counsel]: If Your Honor please, the defendant would – as to Count 1 of the indictment charging murder by premeditation and deliberation, we would ask for a directed verdict. We would acknowledge that there's enough to go to the jury on the felony murder, but I do not – no premeditation or deliberation would be supported.

After hearing from the State, Defendant's counsel clarified that the motion for a directed verdict included counts two - four of the indictment, on

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the charges of felony larceny, robbery with a dangerous weapon, and possession of stolen goods. The trial court denied Defendant's motion.

The jury returned a verdict on 1 May 2015 finding Defendant guilty of first-degree murder in the perpetration of a felony only; it specifically declined to find Defendant guilty of first-degree murder on a theory of premeditation and deliberation. The jury also convicted Defendant of felony larceny, robbery with a dangerous weapon, and possession of stolen goods. After the verdict was announced, Defendant moved "to set aside the verdict for lack of evidence and for legal errors." The trial court denied Defendant's motion. The trial court then entered judgments in accordance with the jury's verdict, and sentenced Defendant to life imprisonment without the possibility of parole on the charge of first-degree murder, and to a concurrent term of imprisonment between sixty-four and eighty-nine months for the other three convictions. Defendant appeals.

## II. Analysis

Defendant contends the trial court erred by denying his motion to dismiss and failing to arrest judgment on the three felonies underlying his conviction for felony first-degree murder. He also contends the trial court plainly erred by allowing the introduction of testimony regarding his attempts to hire an attorney.

# A. Denial of Defendant's Motion to Dismiss

[1] Defendant argues the trial court erred in failing to dismiss for insufficient evidence the charges of robbery with a dangerous weapon, larceny, and first-degree murder. As a preliminary matter, we must determine whether this argument has been properly preserved for our review. As noted, Defendant moved for directed verdict on the charge of first-degree murder under a theory of premeditation and deliberation at the close of State's evidence, but conceded at that time "that there's enough to go to the jury on the felony murder." Before the trial court ruled on the directed verdict motion, Defendant clarified that the motion was also made as to counts two - four of the indictment, those being the charges of larceny, robbery with a dangerous weapon, and possession of stolen goods. After the motion was denied and the jury returned its verdicts, Defendant then made a separate motion "to set aside the verdict for lack of evidence and for legal errors," which was also denied.

In *State v. Mercer*, 317 N.C. 87, 343 S.E.2d 885 (1986), our Supreme Court explained that a defendant's motion "to set aside the verdict as being against the weight of the evidence" is "properly denominated a

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motion for dismissal for insufficiency of the evidence to sustain a conviction . . . after return of a verdict of guilty and before entry of judgment, [N.C. Gen. Stat.] § 15A-1227(a)(3)." *Mercer*, 317 N.C. at 99-100, 343 S.E.2d at 893 (citation and quotation marks omitted, alteration in original). Given that Defendant's motion in the present case was nearly identical to that made by the *Mercer* defendant, we likewise treat Defendant's motion as a motion to dismiss pursuant to N.C.G.S. § 15A-1227(a)(3). *Id.* 

N.C.G.S. § 15A-1227(a)(3) provides in relevant part: "A motion for dismissal for insufficiency of the evidence to sustain a conviction may be made . . . [a]fter return of a verdict of guilty and before entry of judgment." N.C. Gen. Stat. § 15A-1227(a)(3) (2015). The statute also specifically provides that a "[f]ailure to make the motion at the close of the State's evidence or after all the evidence is not a bar to making the motion at a later time," and that "[t]he sufficiency of all evidence introduced in a criminal case is reviewable on appeal without regard to whether a motion has been made during trial[.]" N.C. Gen. Stat. §§ 15A-1227(b),(d) (2015). Notwithstanding Defendant's anomalous concession that the evidence presented by the State was sufficient to withstand a motion for a directed verdict as to the charge of first-degree murder in the perpetration of a felony, we are satisfied that Defendant's latter motion, standing alone, was sufficient to properly preserve this issue for our review. In accord with precedent, we interpret that motion, styled by Defendant's counsel as a motion "to set aside the verdict for lack of evidence and for legal errors," as a motion to dismiss pursuant to N.C. Gen. Stat. § 15A-1227(a)(3). Because Defendant's § 15A-1227(a)(3) motion was made as to all of the convictions against him – including his conviction for first-degree felony murder - we conclude that Defendant properly moved to dismiss each of the charges against him, and consider the merits of Defendant's argument.

[2] This Court reviews a trial court's denial of a motion to dismiss de novo. State v. Smith, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing State v. McKinnon, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). Our review of a trial court's ruling on a motion to dismiss is the same regardless of when the motion was made. State v. Scott, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." State v. Winkler, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citation and quotation marks omitted). "The terms 'more than a scintilla of evidence'

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and 'substantial evidence' are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citation omitted). In reviewing the trial court's ruling, we must evaluate the evidence in the light most favorable to the State, and all contradictions in the evidence must be resolved in its favor. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). The State

is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Winkler, 368 N.C. at 574, 780 S.E.2d at 826 (citation omitted).

"If the trial court finds substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* (citation omitted). "Ultimately, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citation omitted). If, however, the evidence presented at trial is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229-30 (2000) (citation omitted).

Felony murder is defined in N.C. Gen. Stat. § 14-17 as: "A murder which . . . shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree[.]" N.C. Gen. Stat. §14-17(a) (2015). "[T]he elements necessary to prove felony murder are that [1] the killing took place [2] while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies [in N.C.G.S. § 14-17]." *State v. Bunch*, 363 N.C. 841, 846-47, 689 S.E.2d 866, 870 (2010) (quotation omitted). When the jury returned its verdict finding Defendant guilty of first-degree felony murder, it indicated that the felonies underlying the murder conviction were larceny, robbery with a dangerous weapon, and possession of stolen goods. As Defendant only

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argues that the State failed to present "substantial evidence" that he was the perpetrator of larceny and robbery with a dangerous weapon, we only address those two crimes.<sup>1</sup>

Defendant was convicted of felony larceny, pursuant to N.C. Gen. Stat. § 14-72(a), and robbery with a dangerous weapon, pursuant to N.C. Gen. Stat. § 14-87. Defendant does not argue that the State failed to present substantial evidence that larceny and robbery with a dangerous weapon occurred; rather, the gravamen of Defendant's argument is that the State failed to provide substantial evidence that Defendant was the perpetrator of those two offenses. We disagree.

The State presented evidence tending to show that, in the days prior to 20 August 2012, Defendant and Stephens visited Jones' residence and were interested in changing the appearance of a motorcycle, though they did not have a motorcycle with them at the time. Through a multitude of witnesses, the State then presented a timeline of Defendant's, Stephens', and Bouyer's movements on the evening of 20 August 2012 from roughly 6:00 p.m. until 8:59 p.m. At 8:59 p.m., Bouyer departed a meeting with Defendant and Stephens that occurred in the parking lot of the BP station, and all three men were seen heading off in the same direction. Defendant and Stephens were the last to see Bouyer until his body was discovered early the next morning. In the days following the discovery of Bouyer's body, Defendant and Stephens were in possession of Bouyer's motorcycle - the same motorcycle Bouyer was last seen riding at 8:59 p.m. on 20 August 2015. Evidence presented by the State showed Defendant and Stephens delivered Bouver's motorcycle to Jones in the days after Bouyer's death, attempted to have the appearance of the motorcycle altered, and later pursued its sale or destruction.

Other evidence suggested Defendant's presence at the scene where Bouyer's motorcycle was taken, in that Stephens and Defendant were last seen leaving the BP station together in Defendant's Jeep at 8:59 p.m. Stephens' cellphone was then used a total of four times within twenty-one minutes of 8:59 p.m. in the "footprint" of tower 4c4, sector 3, the cell tower and sector in which Bouyer's body was later discovered. Defendant's DNA was found on Bouyer's wallet, which in turn was discovered in Defendant's Jeep. The evidence also suggested that two guns

<sup>1.</sup> While Defendant concedes there was substantial evidence that he committed the crime of possession of stolen goods, he argues that possession of stolen goods may never serve as the predicate felony for a felony first-degree murder conviction. Because we determine the State presented substantial evidence on the robbery with a dangerous weapon and larceny charges, we do not address this argument.

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were used at the scene where Bouyer's body was later found; Bouyer was killed by three shots from a shotgun, and a spent 9-millimeter shell casing was also found within one hundred yards of Bouyer's body. Forensic testing matched the spent shell casing to a Lorcin 9-millimeter handgun later found hidden in Defendant's bedroom.

The evidence presented by the State at trial allowed a reasonable inference that Defendant participated in the robbery and larceny of Bouyer's motorcycle, and that Bouyer was killed during that robbery and larceny. To the extent that some evidence suggested Defendant was alone for a portion of the night, when visiting Graham, and tended to show that Defendant's cellphone was never used within the footprint of Tower 4c4, sector 3, these "contradictions and discrepancies [were] for the jury to resolve and [did] not warrant dismissal." Winkler, 368 N.C. at 574, 780 S.E.2d at 826. In sum, we hold that the State presented substantial evidence to allow the jury to draw a reasonable inference that Defendant was the perpetrator of robbery with a dangerous weapon and larceny. Lee, 348 N.C. at 488, 501 S.E.2d at 343. While much of this evidence was circumstantial, circumstantial evidence is all a trial court needs to deny a defendant's motion to dismiss for insufficient evidence. and it is then for the jury to resolve conflicts in the evidence and determine the defendant's guilt beyond a reasonable doubt. Winkler, 368 N.C. at 574, 780 S.E.2d at 826. The trial court did not err in denying Defendant's motion to dismiss.

## B. Evidence Regarding Defendant's Attempts to Hire An Attorney

[3] Defendant argues the trial court erred in allowing the introduction of evidence regarding Defendant's attempts to hire legal counsel prior to his arrest. As Defendant concedes, he failed to timely object at trial to the testimony regarding his efforts to hire an attorney. Due to that failure, the State contends that Defendant has waived all appellate review of the issue, including our review for plain error. As support for this proposition, the State cites State v. Houser, \_\_\_\_ N.C. App. \_\_\_\_, 768 S.E.2d 626, 632 (2015), in which this Court held that "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error." Houser, \_\_\_\_ N.C. App. at \_\_\_\_, 768 S.E.2d at 632 (quoting *State v. Gobal*, 186 N.C. App. 308, 651 S.E.2d 279 (2007), aff'd per curiam, 362 N.C. 342, 661 S.E.2d 732 (2008) (footnote and citations omitted)). However, our Supreme Court recently reaffirmed that where an alleged constitutional error occurs during either instructions to the jury or on evidentiary issues, an appellate court must review for plain error if it is specifically and distinctly contended:

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[W]e apply the general rule that "failure to raise a constitutional issue at trial generally waives that issue for appeal." [State v. Wilson, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009)]. Nevertheless, because the alleged constitutional error occurred during the trial court's instructions to the jury, we may review for plain error. State v. Cummings, 352 N.C. 600, 612-13, 536 S.E.2d 36, 47 (2000) (quoting State v. Greene, 351 N.C. 562, 566, 528 S.E.2d 575, 578, cert. denied, 531 U.S. 1041, 121 S. Ct. 635, 148 L. Ed. 2d 543 (2000) ("[W]e have previously decided that plain error analysis applies only to instructions to the jury and evidentiary matters.")), cert. denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

State v. May, 368 N.C. 112, 118, 772 S.E.2d 458, 462-63 (2015) (emphasis added). Our Supreme Court has conducted plain error review in cases in which the defendant asserted on appeal that the introduction of evidence and testimony violated their constitutional rights, despite the lack of an objection at trial. See, e.g., State v. Moore, 366 N.C. 100, 104-05, 726 S.E.2d 168, 172 (2012); State v. Raines, 362 N.C. 1, 16-17, 653 S.E.2d 126, 136 (2007).

In the present case, Defendant argued in his brief to this Court that admission of portions of two witnesses' testimony, admitted without Defendant's objection, was erroneous, and admission of the testimony violated his Sixth Amendment rights. Since this argument is rooted in an "evidentiary matter[]," *Greene*, 351 N.C. at 566, 528 S.E.2d at 578, we consider whether introduction of this evidence amounted to plain error. *See State v. Garcell*, 363 N.C. 10, 53, 678 S.E.2d 618, 645 (2009); N.C. R. App. P. 10(a)(4). The plain error rule

is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair

<sup>2.</sup> To be entitled to plain error review, a defendant must "specifically and distinctly contend that the alleged error constituted plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). Here, Defendant has done so; therefore, we proceed to a plain error analysis.

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trial'" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the . . . mistake had a probable impact on the jury's finding that the defendant was guilty."

Cummings, 352 N.C. at 616, 536 S.E.2d at 49 (alterations in original) (quoting State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). To prevail, a defendant must show "not only that there was error, but that absent the error, the jury probably would have reached a different result." State v. Haselden, 357 N.C. 1, 13, 577 S.E.2d 594, 602 (2003) (internal quotation marks and citation omitted).

[4] Defendant contends the State improperly elicited statements from two witnesses regarding his attempts to hire a lawyer, and that these statements likely affected the jury's verdict. First, one of the law enforcement officers involved in the case, Lieutenant Andrew Hanchey ("Lt. Hanchey"), explained from the witness stand that a notepad was among the evidence recovered during a search of Defendant's wife's car. At the prompting of the prosecutor, Lt. Hanchey testified that the notepad contained a note which read "lawyers to call" and listed the names of several law firms. Second, McGowan, the clerk at the BP station, was asked by the prosecutor to recall all instances in which she had seen Defendant and Stephens after Bouyer's body had been discovered. McGowan recounted her last encounter with Defendant:

[Prosecutor:] . . . [W]hen was the next time you saw [Defendant]?

[McGowan:] He came in the store. I'm not sure the date, but it's the date that he got arrested. He came in the store. I was working second shift that day, and he had a little, yellow notepad, and he was trying to get me to write my name and my address and stuff down, because he said that they were going to get a lawyer and, you know, "Put your information down right here so we can go get this lawyer."

[Prosecutor:] Did you agree to do that?

[McGowan:] No.

[Prosecutor:] Why not?

[McGowan:] I told [Defendant] that I didn't need a lawyer, that guilty people need a lawyer, and I wanted him to leave me alone.

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This particular exchange ended that day's testimony; except for mentioning the exchange as a reference point for resuming McGowan's testimony the following day, the prosecutor did not ask any additional questions regarding Defendant's attempts to hire an attorney.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. Amend. VI. This fundamental right was made applicable to the States through the Fourteenth Amendment, see, e.g., McMann v. Richardson, 397 U.S. 759, 25 L. Ed. 2d 763 (1970); State v. Wise, 64 N.C. App. 108, 306 S.E.2d 569 (1983), and includes the right of an accused to select an attorney of his or her choice. State v. Yelton, 87 N.C. App. 554, 559, 361 S.E.2d 753, 757 (1987). Our Supreme Court has held that "there are 'no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it[;] [t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." State v. Ladd, 308 N.C. 272, 284, 302 S.E.2d 164, 172 (1983) (quoting Grunewald v. United States, 353 U.S. 391, 425, 1 L. Ed. 2d 931, 955 (1956) (Black, J., concurring)).

We have no difficulty concluding that the two exchanges violated Defendant's Sixth Amendment right to counsel, and should not have been admitted into evidence. Lt. Hanchey's statement served no purpose other than to inform the jury that Defendant had attempted to hire an attorney prior to his arrest. Likewise, McGowan's opinion that only "guilty people need a lawyer" is the epitome of using "a constitutional privilege to discredit or convict a person who asserts it." *Ladd*, 308 N.C. at 284, 302 S.E.2d at 172. Having determined that admission of these statements was error, we consider whether admission of these statements amounted to plain error. We hold that it did not.

A review of the transcript reveals that, while the prosecutor in this case elicited Lt. Hanchey's testimony regarding the "lawyers to call" note, the prosecutor did not emphasize or highlight Defendant's exercise of his rights, and questioning immediately moved on to other subjects. With regard to McGowan's testimony that "only guilty people need lawyers," we note that the prosecutor's question which elicited this response was relatively innocuous – the prosecutor merely asked McGowan why she declined to give Defendant her contact information. After McGowan gave her inflammatory answer, the prosecutor declined to capitalize on or to emphasize McGowan's comments. *See Moore*, 366 N.C. at 106-107, 726 S.E.2d at 173-74 (holding that statements of a witness regarding the defendant's invocation of his constitutional rights did not amount to

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plain error where the prosecutor "did not emphasize, capitalize on, or directly elicit [the witness's] prohibited responses"); *State v. Alexander*, 337 N.C. 182, 196, 446 S.E.2d 83, 91 (1994) (finding no plain error where the prosecutor asked a State's witness, a police officer, if the defendant spoke or talked to him, and noting that the comments were "relatively benign" and that the prosecutor did not emphasize that the defendant did not speak with law enforcement after his arrest). Given the passing nature of these statements, the lack of emphasis or detailed discussion of these comments by the prosecutor, and the voluminous amount of other testimony and evidence received throughout this case, we do not believe the statements by Lt. Hanchey and McGowan "had a probable impact on the jury's finding that [D]efendant was guilty." *Cummings*, 352 N.C. at 616, 536 S.E.2d at 49. Therefore, admission of the testimony was not plain error.

# C. Failure to Arrest Judgment/Vacatur of Underlying Felonies

**[5]** Defendant next argues the trial court erred by failing to arrest judgment on all of the felonies underlying his felony first-degree murder conviction. The State concedes the error, but maintains the proper remedy is to arrest judgment on Defendant's robbery with a dangerous weapon conviction, and vacate the larceny and possession of stolen goods convictions.

In its verdict, the jury indicated it had determined that the robbery with a dangerous weapon, larceny, and possession of stolen goods convictions served as the predicate felonies underlying Defendant's conviction for first-degree felony murder. Our Supreme Court has held that when a defendant is convicted of felony murder, "the underlying felony supporting a conviction for felony murder merges into the murder conviction. The underlying felony provides no basis for an additional sentence, and any judgment imposed thereon must be arrested." *State v. Barlowe*, 337 N.C. 371, 381, 446 S.E.2d 352, 358-59 (1994); *see also State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002) (noting that conviction of the underlying felony "constitutes an element of first-degree murder," requiring merger for sentencing purposes). Following this rule in the present case, we find the trial court erred in failing to arrest judgment on Defendant's conviction for robbery with a dangerous weapon.

Normally, "[o]nly one underlying felony is necessary to support a felony-murder conviction[.]" *Barlowe*, 337 N.C. at 381, 446 S.E.2d at 358. While the merger rule "requires the trial court to arrest judgment on at least one of the underlying felony murder convictions if two separate convictions supported the conviction for felony murder," the trial court

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is permitted to use its "discretion to select which felony conviction would serve as the underlying felony." *State v. Ridgeway*, 185 N.C. App. 423, 437, 648 S.E.2d 886, 896 (2007) (emphasis added) (citations and internal quotation marks omitted). The other felony convictions are not required to be arrested under the merger rule. *Id*.

Application of this rule would suggest that a remand to the trial court is necessary for it to exercise discretion in choosing which of the three felonies on which to arrest judgment. However, remand for this purpose is not needed in the present case because the three felonies underlying Defendant's first-degree murder conviction are not "separate convictions." Defendant's convictions for robbery with a dangerous weapon, larceny, and possession of stolen goods all related to the same event – the taking and subsequent possession of Bouyer's motorcycle. Our Supreme Court has held that felony larceny is a lesser-included offense of robbery with a dangerous weapon when both charges stem from the same taking. See State v. Cobb, 150 N.C. App. 31, 43, 563 S.E.2d 600, 609 (2002) (citing State v. White, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988)). A trial court "violate[s] federal and state constitutional principles against double jeopardy," when it sentences a defendant for a robbery with a dangerous weapon and larceny arising out of the same taking, and the proper remedy is to arrest judgment on the larceny conviction. State v. Jaynes, 342 N.C. 249, 276, 464 S.E.2d 448, 465 (1995) (citing State v. Adams, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992)).

Similarly, our Supreme Court has held that while "[l]arceny and possession of property stolen in the larceny are separate crimes" because "[e]ach crime requires proof of an additional fact which the other does not," our General Assembly "did not intend to punish an individual for receiving or possession of the same goods that he stole." State v. Perry, 305 N.C. 225, 234-37, 287 S.E.2d 810, 815-17 (1982), overruled in part on other grounds by State v. Mumford, 364 N.C. 394, 402, 699 S.E.2d 911, 916 (2010); see also State v. Moses, 205 N.C. App. 629, 640, 698 S.E.2d 688, 696 (2010) (noting that the "Legislature . . . did not intend to subject a defendant to multiple punishments for both robbery and the possession of stolen goods that were the proceeds of the same robbery"). In *Perry*, a case in which the defendant was convicted of both larceny and possession of the goods stolen in that larceny, our Supreme Court chose to vacate the possession of stolen goods conviction, rather than arrest judgment on that conviction. Perry, 305 N.C. at 237, 287 S.E.2d at 817. Following *Perry*, we do the same in the present case.

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### III. Conclusion

The State presented "substantial evidence" that Defendant was the perpetrator of the crimes for which he was charged and convicted, and the trial court did not err in denying Defendant's motion to dismiss the charges of first-degree felony murder, robbery with a dangerous weapon, and larceny. The trial court erred in admitting the two statements elicited by the State regarding Defendant's attempts to hire an attorney. Those statements violated Defendant's Sixth Amendment right to counsel. However, given the passing nature of those statements, the circumstances in which they arose, and the voluminous other evidence presented against Defendant in the course of his trial, we conclude that the error did not likely affect the jury's verdict and for that reason did not amount to plain error.

Regarding Defendant's sentencing, the trial court's judgment of life in prison without the possibility of parole corresponding with Defendant's conviction for first-degree felony murder remains undisturbed. However, we arrest judgment on Defendant's convictions for robbery with a dangerous weapon and larceny, and vacate Defendant's conviction for possession of stolen goods.

NO ERROR IN PART; NO PLAIN ERROR IN PART; JUDGMENT ARRESTED IN PART; VACATED IN PART.

Judges STROUD and INMAN concur.

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STATE OF NORTH CAROLINA v. LINZIE LEE SWINK, DEFENDANT

No. COA16-89

Filed 7 March 2017

# 1. Criminal Law—bench trial—waiver of jury trial effective

The trial court had the authority to try defendant for the rape of a child and for indecent liberties where defendant requested a bench trial on 2 March 2015. Defendant contended that his waiver of a jury trial under N.C.G.S. § 15A-1201 was not effective because that statute only applied to cases arraigned on or after 1 December 2014, and he was never formally arraigned. However, defendant never requested an arraignment; if he had been arraigned, it would have been on or after 1 December 2014, and the 2 March 2015 hearing essentially served the purpose of the arraignment.

# 2. Criminal Law—bench trial—alleged ineffective waiver of jury trial—no prejudice

Defendant was not able to show prejudice in a case in which he claimed that his bench trial was unauthorized because he was not indicted. Defendant was charged with raping a child and taking indecent liberties, he made a strategic decision to ask for a bench trial, and he was acquitted of two of the charges at the bench trial.

# 3. Constitutional Law—right to jury trial—waiver—constitutionally sufficient

The trial court did not err in its inquiry into defendant's waiver of a jury trial, and defendant's waiver was constitutionally sufficient where he consistently requested a bench trial throughout the proceedings, he was represented by counsel of his choice throughout the proceedings, and he never expressed any hesitation about his choice to waive his right to a jury trial.

Appeal by defendant from judgments entered on or about 4 May 2015 by Judge Hugh B. Lewis in Superior Court, Catawba County. Heard in the Court of Appeals 8 August 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennifer T. Herrod, for the State.

W. Michael Spivey for defendant-appellant.

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STROUD, Judge.

Defendant Linzie Lee Swink appeals his convictions for rape of a child and indecent liberties with children. On appeal, defendant argues that the trial court lacked authority to try him without a jury, in violation of the North Carolina Constitution and N.C. Gen. Stat. § 15A-1201, and that the trial court erred when it failed to adequately determine whether defendant made a knowing and voluntary waiver of his right to a jury trial. We disagree and affirm the actions of the trial court.

#### **Facts**

Defendant was indicted on or about 3 December 2012 for two counts of rape of a child (12 CRS 7763 and 12 CRS 7764), on or about 3 September 2013 for one count of taking indecent liberties with children (13 CRS 4688), and on or about 2 March 2015 for superseding indictments of rape of a child (12 CRS 55705) and sexual offense with a child (15 CRS 50932). Defendant filed a motion for a bill of particulars, which the State answered on 25 February 2015. The State's answer laid out details of the date and time of each offense. On 2 March 2015, the trial court heard defendant's request for a bench trial. The court inquired into defendant's waiver, calling him to the stand and engaging in the following colloquy with defendant:

THE COURT: Sir, are you able to hear and understand me?

MR. SWINK: Yes, sir.

THE COURT: And are you under the influence of any alcoholic beverages, drugs, narcotics or pills at this time?

MR. SWINK: No, sir.

THE COURT: And how old are you?

MR. SWINK: 40.

THE COURT: And at what grade level can you read and write?

MR. SWINK: Probably 11th grade right now, 11th.

THE COURT: Do you suffer from any mental handicap or physical handicap that would prevent you from understanding what's going on in this courtroom?

MR. SWINK: No, sir.

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THE COURT: And you are represented by counsel.

MR. SWINK: Yes, sir.

THE COURT: And you had the opportunity to discuss this waiver with him?

MR. SWINK: Yes, Sir.

THE COURT: And he has discussed with you the pros and cons of waiving these Constitutional rights to a jury trial?

MR. SWINK: Yes, sir.

THE COURT: And having balanced those pros and cons, you have made the decision -- and it is your decision, you understand that?

MR. SWINK: Yes, sir.

THE COURT: Not anybody else's.

MR. SWINK: Yes, sir.

THE COURT: That you prefer to have a judge decide your case as opposed to a jury of 12 individuals?

MR. SWINK: Yes, sir.

The trial court allowed the waiver and granted defendant's bench trial request. Defendant's waiver was later reduced to writing and signed by defendant on or about 28 April 2015.

On 4 May 2015, the trial court found defendant guilty of two counts of rape of a child (12 CRS 7763 and 12 CRS 7764) and one count of indecent liberties with a child (13 CRS 4688), and not guilty of the two remaining charges (12 CRS 55705 and 15 CRS 50932). Defendant timely appealed the guilty verdicts to this Court.

#### Discussion

## I. Waiver of Jury Trial

[1] Defendant first argues that the trial court lacked authority to try him without a jury and that his waiver was not authorized under N.C. Gen. Stat. § 15A-1201 (2013). North Carolina voters approved an amendment

<sup>1.</sup> The 2013 statute volume contains both the version of N.C. Gen. Stat.  $\S$  15A-1201 effective before 1 December 2014 and the amended version effective 1 December 2014

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to N.C. Gen. Stat. § 15A-1201(b) on 4 November 2014 which allows criminal defendants to waive the right to a trial by jury. See 2013 N.C. Sess. Law 2013-300 (eff. Dec. 1, 2014). The amended statute became effective on 1 December 2014 and applied "to criminal cases arraigned in superior court on or after that date." Id. Defendant argues that since the statute as amended is only applicable to cases in which the defendant was arraigned on or after 1 December 2014, the statute is inapplicable to him – since he was never formally arraigned – so the court should not have allowed him to waive his right to a jury trial.

In order to succeed with this claim, defendant would have to be able to show both that the trial court violated the statute and that such violation prejudiced him. *See*, *e.g.*, *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) ("[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding [the] defendant's failure to object at trial."); *see also State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 240-41 (2006) ("However, a new trial does not necessarily follow a violation of statutory mandate. Defendants must show not only that a statutory violation occurred, but also that they were prejudiced by this violation." (Citations omitted)). Defendant cannot do either in this case.

First, defendant has not shown that N.C. Gen. Stat. § 15A-1201 was violated. If defendant was arraigned at all in this case, it would have been on or after 1 December 2014. Defendant was indicted on multiple counts between 3 December 2012 and 2 March 2015. The trial court heard defendant's request for a bench trial at the hearing on 2 March 2015, well after the date the amendment to the statute took effect. Moreover, arraignment is not mandatory. Under N.C. Gen. Stat. § 15A-941(d) (2015), a defendant will be arraigned only if the defendant files a written request within 21 days of being served an indictment. Although defendant's counsel mentioned arraignment more than once during the pretrial proceedings, defendant admits on appeal that he "never requested arraignment and thus was never arraigned."

In addition, while there is no dispute that defendant never requested a formal arraignment, the 2 March 2015 hearing essentially served the purpose of an arraignment. This Court addressed a similar situation in *State v. Jones*, \_\_ N.C. App. \_\_, 789 S.E.2d 651 (2016). In *Jones*, as in

that was contingent on a public vote. The statute was also later amended again, effective 1 October 2015, to include a more detailed waiver procedure, with this version applying "to defendants waiving their right to trial by jury on or after that date." *See* 2015 N.C. Sess. Laws 2015-289 (eff. Oct. 1, 2015).

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this case, the defendant never requested a formal arraignment pursuant to N.C. Gen. Stat. § 15A-941. *Id.* at \_\_\_, 789 S.E.2d at 655. The *Jones* Court found that by not doing so, "his right to be formally arraigned by means of this statutory procedure was deemed waived on or about 2 August 2010 – 21 days after he was indicted." *Id.* at \_\_\_, 789 S.E.2d at 655. We noted in *Jones* that "it is not uncommon for a defendant to forego the procedure set out in [N.C. Gen. Stat.] § 15A-941 and for his arraignment to take place more informally." *Id.* at \_\_\_, 789 S.E.2d at 655. Ultimately, this Court found that the defendant in *Jones* was informally arraigned on 11 May 2015, when he pled not guilty, and that "because Defendant's arraignment occurred after the effective date of the constitutional amendment and accompanying session law, the trial court was constitutionally authorized to accept Defendant's waiver of his right to a jury trial." *Id.* at \_\_\_, 789 S.E.2d at 655.

Here, as in *Jones*, defendant never requested a formal arraignment, so his right to such formal arraignment is deemed waived. *Id.* at \_\_\_, 789 S.E.2d at 655. Moreover, while in this case, defendant may not have explicitly stated a "not guilty" plea at the 2 March 2015 hearing, he implicitly plead not guilty when he requested a bench trial. And the 2 March 2015 hearing served the same function as an arraignment, similar to the 11 May 2015 hearing in *Jones. Id.* at \_\_\_, 789 S.E.2d at 655. Accordingly, we conclude the same as the *Jones* Court that "because Defendant's arraignment occurred after the effective date of the constitutional amendment and accompanying session law, the trial court was constitutionally authorized to accept Defendant's waiver of his right to a jury trial." *Id.* at \_\_\_, 789 S.E.2d at 655.

[2] Furthermore, even if we assumed there was a violation of the statute, defendant has not met the second prong of the standard: prejudice. See Ashe, 314 N.C. at 39, 331 S.E.2d at 659. Defendant made a strategic decision to ask for a bench trial in this case, and he has not shown on appeal how that decision prejudiced him. Defendant was charged with two counts of rape of a child and one count of taking indecent liberties with children. Given these charges and defendant's alibi defense, which required a bill of particulars, we need not speculate much to understand why defendant would make the strategic decision to ask for a bench trial. Furthermore, defendant was acquitted of two charges against him during the bench trial, so if anything, having a bench trial most likely worked in his favor.

Defendant argues that the "denial of the right to a jury trial is a structural error requiring automatic reversal without a showing of prejudice." But the cases defendant cites involve fatal constitutional errors

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depriving the defendant of his or her constitutional right to a jury trial, rather than the intentional waiver of a statutory right to a jury trial, which is what is at issue here. Cf. State v. Bunning, 346 N.C. 253, 257, 485 S.E.2d 290, 292 (1997) (improper alternate juror substitution after jury deliberations had already begun led to "[a] trial by a jury which . . . is so fundamentally flawed that the verdict cannot stand."); State v. Bindyke, 288 N.C. 608, 627, 220 S.E.2d 521, 533 (1975) ("[T]he presence of an alternate in the jury room during the jury's deliberations violates N.C. Const. art. I, § 24 and G.S. 9-18 and constitutes reversible error per se."); State v. Hudson, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971) (Defendant's waiver of his right to a trial by twelve jurors after one juror became ill and had to be excused violated the law in this State - as it stood at that time - that "no person can be finally convicted of any crime except by the unanimous consent of twelve jurors who have been duly impaneled to try his case."); Sullivan v. Louisiana, 508 U.S. 275, 281, 282, 124 L. Ed. 2d 182, 190-91, 113 S. Ct. 2078, 2082, 2083 (1993) (jury instruction with unconstitutional definition of reasonable doubt led to "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt" that "unquestionably qualifies as 'structural error.' "); Rose v. Clark, 478 U.S. 570, 586-87, 92 L. Ed. 2d 460, 476, 106 S. Ct. 3101, 3110 (1986) (noting that "harmless-error inquiry remains inappropriate for certain constitutional violations no matter how strong the evidence of guilt may be."). As we have concluded in this case that no constitutional error occurred. defendant's argument regarding structural error has no merit here.

## II. Knowing and Voluntary

[3] Next, defendant argues that his waiver was not constitutionally sufficient and that the trial court erred by failing to conduct an adequate inquiry into whether he made a knowing and voluntary waiver of his right to a jury trial. We disagree.

The North Carolina Constitution was amended by 2013 N.C. Sess. Law 2013-300 (eff. Dec. 1, 2014) to allow defendants in criminal cases to waive the right to a jury trial and now states in relevant part:

No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly.

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N.C. Const. art. I,  $\S$  24. This amendment "[became] effective December 1, 2014, and applies to criminal cases arraigned in superior court on or after that date." 2013 N.C. Sess. Laws 2013-300 (eff. Dec. 1, 2014). Since we have concluded that defendant must have been arraigned on or after 1 December 2014, the constitution as amended would apply.<sup>2</sup>

At the time defendant requested to waive his right to a trial by jury in this case in early March 2015, N.C. Gen. Stat. § 15A-1201 noted that such waiver may be done "in writing or on the record in the court and with consent of the trial judge" so long as the waiver is made "knowingly and voluntarily[.]" Federal courts interpreting the United States Constitution similarly are required to find whether a defendant's waiver of his Sixth Amendment right to a trial by jury is knowing, voluntary, and intelligent. See United States v. Boynes, 515 F.3d 284, 286 (4th Cir. 2008) ("The Sixth Amendment requires that the waiver [of the right to a jury trial] be knowing, voluntary, and intelligent.").

Here, defendant's waiver was knowing and voluntary and made both in writing and personally in open court on the record. First, the trial court engaged in a colloquy with defendant eight weeks before trial. On 2 March 2015, defendant was sworn in and questioned about his age, education, representation by counsel, and his request to waive his right to a jury trial. The court concluded that "defendant has knowingly and with advice from counsel . . . made his individual decision to waive his right to a jury trial and will be allowed to go forward with a bench trial." Defendant then signed a written waiver form that same date.

Additionally, on 28 April 2015, before the bench trial began, the court reiterated that defendant had requested a bench trial and waived his right to a trial by jury. The court asked whether waiver was "still the desire of the defendant[,]" and defendant's trial counsel affirmatively responded that it was. The court then had defendant and his attorney come forward to date and sign a certification form. Defendant's trial counsel noticed that the form was dated for 2 March 2015 and asked

<sup>2.</sup> Although the North Carolina Constitution as amended now provides that the exercise of the waiver is "subject to procedures prescribed by the General Assembly," N.C. Const. art. I, § 24, we note that the General Assembly had not prescribed any specific procedures for waiver of jury trial that would have been effective at the time defendant's waiver was made to the trial court in this case. A subsequent amendment to N.C. Gen. Stat. § 15A-1201 (2015) does contain further guidance on the waiver procedure that "applies to defendants waiving their right to trial by jury on or after [October 1, 2015]." 2015 N.C. Sess. Laws 2015-289 (eff. Oct. 1, 2015). We therefore rely upon existing law in analogous situations to resolve this case, while acknowledging the limited scope of cases for which this may be applicable.

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whether "to leave that date as is or would you like me to change[?]" The Court instructed counsel to "add today's date under that date as well since that's when he originally made his decision."

Defendant's written waiver further demonstrated that his waiver was knowing and voluntary. With the written waiver, defendant had a chance to reaffirm his decision to seek a bench trial, and he did so. On appeal, defendant raises new questions about his written waiver, such as that the waiver form states that a transcript of the hearing on 2 March 2015 was attached, but the transcript was not prepared until 3 March 2015. But defendant cites no authority supporting his claim that these alleged inconsistencies render his written waiver ineffective. Defendant has not disputed that he personally signed the waiver form, and the form reflects that his attorney advised him of the charges against him, the nature and punishment for each charge, the nature of the proceedings, and his rights including the right to participate in selecting the jury and his right to a unanimous jury verdict. The waiver also noted that by waiving his right to a jury trial, the judge alone would decide defendant's guilt or innocence. Defendant also has not contested the accuracy of his attorney's certification on the waiver form.

Defendant consistently requested a bench trial throughout the proceedings below many times: through his counsel on 2 February 2015; on the record at the 2 March 2015 hearing; and in writing on 28 April 2015. Defendant was represented by counsel of his choice throughout the proceedings, and he never expressed any hesitation about his choice to waive his right to a jury trial. Defendant's waiver of his right to trial by jury was constitutional, and the record reflects that his waiver was knowing and voluntary. We therefore affirm the trial court.

#### III. Conclusion

Accordingly, we affirm defendant's convictions and hold that the trial court did not err by allowing defendant to waive his right to a jury trial, and his waiver was knowing and voluntary.

#### AFFIRMED.

Chief Judge McGEE and Judge CALABRIA concur.

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# STATE OF NORTH CAROLINA v. DEAN MICHAEL VARNER, DEFENDANT

No. COA16-591

Filed 7 March 2017

# Child Abuse, Dependency, and Neglect—misdemeanor child abuse—failure to give requested jury instruction—right to discipline

The trial court erred in a misdemeanor child abuse case by failing to give a requested jury instruction concerning a parent's right to discipline his child. There was insufficient evidence to show that defendant's paddling caused or was calculated to cause permanent injury.

Appeal by Defendant from judgment entered 14 January 2016 by Judge Thomas H. Lock in Lee County Superior Court. Heard in the Court of Appeals 1 December 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Caroline Farmer, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for the Defendant.

DILLON, Judge.

Dean Michael Varner ("Defendant") was convicted of misdemeanor child abuse for inflicting physical injuries on his son with a paddle. Defendant appeals, contending that the trial court erred by failing to give a requested jury instruction concerning a parent's right to discipline his or her child. We reverse.

# I. Factual Background

The evidence presented at trial tended to show as follows: Defendant and his ten-year old son were having pizza for dinner at the kitchen table with other family members. Defendant's son, who was a "picky eater," refused to eat the pizza, telling Defendant that pizza made him gag. Defendant left the table, briefly sat down in the living room, and then retrieved a paddle. Defendant returned to the kitchen table with the paddle, stood next to his son, who was still seated at the kitchen table, and

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counted down from three. After completing his countdown, Defendant struck his son's left thigh three times with the paddle. Defendant also struck his son's foot as his son pulled his leg up in an attempt to block the blows. Defendant's son then took a bite of the pizza.

The next morning, Defendant's son had bruising on his thigh, from his knee to his waist. For several days thereafter, Defendant's son was in pain from the punishment, walking with a slight limp and unable to participate in gym class at school. After several days, the pain and bruising subsided.

Months later, the State obtained an indictment, charging Defendant with felony child abuse.

## II. Procedural Background – Jury Instructions

Prior to the case being sent to the jury, the parties and the trial judge held a charge conference to discuss the jury instructions. During the charge conference, the trial judge indicated to the parties that he was planning to include an instruction to advise the jury that it could not convict Defendant if it determined that his son's physical injuries were inflicted as a result of Defendant's "moderate punishment to correct [his] child." Neither party objected to this instruction.

The trial judge, however, further indicated that he would give an instruction defining "moderate punishment" as "punishment that does not cause *lasting* injury." The State objected to this definition, contending that "moderate punishment" should not be limited to that which produced lasting injuries. The trial judge agreed with the State and, over Defendant's objection, struck this definition. In the end, the trial judge left "moderate punishment" undefined, leaving it to the jury to determine whether the punishment inflicted by Defendant on his son was moderate "according to the facts and circumstances of the particular case and in the exercise of [their] reason and common sense."

The jury acquitted Defendant of felony child abuse but found him guilty of the lesser-included offense of *misdemeanor* child abuse. Defendant gave timely notice of appeal.

#### III. Analysis

Defendant's sole argument on appeal is that the trial court committed reversible error when it struck the proposed instruction defining "moderate punishment" as punishment which caused "lasting" injury to the child. Specifically, Defendant contends that the instruction impermissibly allowed the jury to convict him simply because they thought

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Defendant's *degree* of punishment was excessive, even if they thought Defendant was acting in good faith and did not inflict a lasting injury upon his child. We agree with Defendant. Even though sufficient evidence was presented to convict Defendant of misdemeanor child abuse, we are compelled to reverse and remand for a new trial.

On appeal, this Court reviews jury instructions *de novo*, *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009), considering the matter anew and substituting its own judgment for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

A parent commits misdemeanor child abuse when the parent intentionally inflicts any "physical injury" on their child who is under 16 years of age. N.C. Gen. Stat.  $\S$  14-318.2 (2013).

A parent, however, has the constitutionally protected "paramount right" to raise one's children as the parent sees fit. *See Peterson v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994). Accordingly, our Supreme Court has recognized that, as a general rule, a parent (or one acting *in loco parentis*) is *not* criminally liable for inflicting physical injury on a child in the course of lawfully administering corporal punishment. *State v. Alford*, 68 N.C. 322, 323 (1873).

This general rule regarding a parent's right to administer corporal punishment does not apply: (1) where the parent administers punishment "which may seriously endanger life, limb or health, or shall disfigure the child, or cause any other permanent injury[,]" Alford, 68 N.C. at 323; (2) where the parent does not administer the punishment "honestly" but rather "to gratify his own evil passions[,]" irrespective of the degree of the physical injury inflicted,  $State\ v.\ Thorton$ , 136 N.C. 610, 615, 48 S.E. 602, 604 (1904); or (3) where the parent uses "cruel or grossly inappropriate procedures . . . [or] devices to modify" a child's behavior, N.C. Gen. Stat. § 7B-101(1)(c) (2013).

In 1837, our Supreme Court recognized the power of those with parental authority to administer "moderate" corporal punishment:

One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with power to administer moderate correction, when he shall believe it to be just and necessary.

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State v. Pendergrass, 19 N.C. 365, 365-66 (1837) (emphasis added). The Court defined "moderate punishment" not as this phrase might be understood today, but more narrowly to include *any* punishment which did not produce "permanent" injury, including any punishment that "may seriously endanger life, limbs or health, or shall disfigure the child[.]" *Id.* at 366.

Our Supreme Court further held in *Pendergrass* that even where a punishment does not produce or threaten a permanent injury, a parent may nonetheless be held criminally responsible if he administers the correction to "gratify his own bad passions[.]" *Id.* at 367. But if a parent inflicts the punishment "honestly" and the punishment does not produce or threaten permanent injury, the law will not question the parent's discretion to choose the *degree* of punishment to inflict: "[A parent] cannot be made penally responsible for error of judgment, but only for wickedness of purpose." *Id.* at 366.

In conclusion, our Supreme Court stated in *Pendergrass* that a proper instruction informs the jury that a parent is not criminally liable for injuring his child during the administration of corporal punishment "unless the jury could clearly infer from evidence, that the correction inflicted had produced, or was in its nature calculated to produce, lasting injury to the child" *or* "unless the facts [] induced a conviction in their minds that the defendant did not act honestly in the performance of duty, according to [a] sense of right, but [rather] under the pretext of duty, [for the purpose of] gratifying malice." *Id.* at 368.

In 1873, the Court relied on *Pendergrass* to affirm the right of a step-father, acting *in loco parentis*, to administer corporal punishment where the punishment was not "calculated to produce lasting injury." *Alford*, 68 N.C. at 324.

Our Supreme Court last cited *Pendergrass* in 1904, when it reaffirmed the holding and approved an instruction which informed the jury of its duty *not* to convict even if it found that "the whipping was more than was necessary, and was attended by bodily pain and suffering," unless "they found that there was either malice or a permanent injury; the latter being an injury which is lasting and will continue indefinitely." *See Thorton*, 136 N.C. 610, 48 S.E. 602 (1904).

<sup>1.</sup> *Pendergrass* was authored by Justice William Gaston, one of our State's most prominent justices (serving from 1833 until his death in 1844), the writer of our State song, *The Old North State* (in 1835), and for whom Gaston County was named (in 1846).

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Our Supreme Court has never disavowed the principles set forth in *Pendergrass* regarding a parent's right to discipline their child.

Our General Assembly, though, has since further limited a parent's authority to discipline his child by declaring that a minor is "abused" when a parent uses a "cruel or grossly inappropriate" procedure or device to discipline the minor. N.C. Gen. Stat. § 7B-101(1)(c).<sup>2</sup>

Applying the above principles to the facts in the present case, we conclude that there was not sufficient evidence from which a jury could find that Defendant's paddling caused or was calculated to cause permanent injury. However, we conclude that there was sufficient evidence from which a juror could find that Defendant acted with malice. For instance, there was evidence that Defendant cursed and yelled at his son prior to administering the paddling. And a juror could find that the paddling in this case was excessive, which is *some* evidence of malice. But we further conclude that a jury could reasonably find based on the evidence that Defendant administered the paddling without malice and that the punishment was not *grossly* inappropriate, regardless of whether the jury might have believed that the paddling was otherwise excessive.

The instruction here allowed the jury to convict if it determined that the punishment administered by Defendant was not "moderate," without giving further guidance as to what constitutes "moderate" punishment, except that the jury was to use their own "reason and common sense." The trial court refused Defendant's request to clarify the term "moderate" as meaning any punishment that did not produce a "lasting" injury. This was reversible error.

Without the clarification, the jury was free to convict Defendant of misdemeanor child abuse even if it determined that Defendant acted honestly but, in their minds, excessively. Therefore, we reverse Defendant's conviction and remand the matter for further proceedings not inconsistent with this opinion.

We note that it would have been proper for the State to request an instruction advising the jury that it could nonetheless convict if it determined that Defendant acted out of "wickedness of purpose,"

<sup>2.</sup> Our General Assembly has also declared that a school official, when acting in *loco* parentis, may discipline a student when otherwise authorized so long as the official does not inflict physical injury which "requires medical attention beyond simple first aid." N.C. Gen. Stat. § 115C-390.4(5) (2013).

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irrespective of the extent of the physical injuries. See Pendergrass, 19 N.C. at 366.

REVERSED AND REMANDED.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA  $\mbox{v.}$  TEON JAMELL WILLIAMS, DEFENDANT

No. COA16-592

Filed: 7 March 2017

# 1. Narcotics—two substances mixed together—possession of particular substance

Defendant was not improperly convicted of possession withintent to manufacture, sell, or deliver (PWIMSD) 4-Methylethcathinone where he had already been convicted and sentenced for PWIMSD Methylone and argued that the two were the same substance under N.C.G.S. § 90-89 because they were mixed together. Possession of any mixture that contains any quantity of a Schedule I controlled substance is sufficient to charge a defendant with possession of the particular substance and to support a conviction for possession of the substance. This is true not only where the controlled substances are listed in separate schedules but also when the defendant is convicted of possession of two separate, distinct Schedule I substances.

# 2. Collateral Estoppel and Res Judicata—motion to suppress—case remanded

The trial court properly denied defendant's motion to suppress based on collateral estoppel where defendant had filed a motion which was practically identical in a prior prosecution for which he had been improperly indicted. The trial court correctly applied the doctrine of collateral estoppel.

Appeal by Defendant from judgment entered 1 February 2016 and order entered 3 February 2016 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 11 January 2017.

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#### STATE v. WILLIAMS

[252 N.C. App. 231 (2017)]

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas O. Lawton, III, for the State.

Meghan Adelle Jones for the Defendant.

DILLON, Judge.

Teon Jamell Williams ("Defendant") entered an *Alford* plea to possession with intent to manufacture, sell, or deliver ("PWIMSD") a Schedule I controlled substance and attaining habitual felon status. Defendant reserved the right to appeal the trial court's denial of his motion to suppress evidence obtained during a search of his residence. For the following reasons, we affirm.

# I. Background

In 2013, during a routine search of Defendant's residence, Defendant's probation officer discovered a bag containing a white, powdery substance. Laboratory results determined that the bag contained two separate Schedule I substances, Methylone and 4-Methylethcathinone. *See* N.C. Gen. Stat. § 90-89(5)(j) (2013).

Defendant was indicted for PWIMSD "Methylethcathinone," where the prefix "4" was inadvertently omitted from the drug name, and for PWIMSD Methylone. Prior to his trial, Defendant filed a motion to suppress, which was denied by the trial court. He was convicted on both counts and given consecutive sentences. In the first appeal to this Court, we affirmed Defendant's conviction for PWIMSD Methylone; however, we vacated Defendant's conviction for PWIMSD "Methylethcathinone" because the name of the controlled substance, an essential element of the crime, was not properly alleged in the indictment. *State v. Williams*, \_\_\_\_, N.C. App. \_\_\_\_, \_\_\_, 774 S.E.2d 880, 885-86 (2015) (unpublished).

In 2015, the State indicted Defendant for PWIMSD "4-Methylethcathinone" rather than simply "Methylethcathinone." Defendant filed a motion to suppress which was functionally identical to the motion to suppress he filed prior to his first trial. The trial court denied the second motion to suppress based on the doctrine of collateral estoppel, stating that the motion "relate[d] to the same chain of events and same transaction and occurrence . . . and relate[d] to the same issues" as Defendant's first motion to suppress heard prior to the first appeal.

Following the denial of his second suppression motion, Defendant was found guilty PWIMSD of 4-Methylethcathinone, a Schedule I

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substance, and was sentenced accordingly. Defendant gave notice of appeal in open court.<sup>1</sup>

# II. Analysis

On appeal, Defendant argues that the trial court erred in sentencing him a second time for possession of what he contends was a single Schedule I substance. Alternatively, Defendant argues that the trial court erred in denying his motion to suppress. We shall address each argument in turn.

## A. Sentencing

[1] Defendant first argues that the trial court improperly convicted him of PWIMSD 4-Methylethcathinone where he had already been convicted and sentenced for PWIMSD Methylone because both substances were mixed together in the same bag. Defendant's argument is one of statutory interpretation, specifically the language in N.C. Gen. Stat. § 90-89.

N.C. Gen. Stat. § 90-89 is the statute which classifies certain substances as Schedule I controlled substances. N.C. Gen. Stat. § 90-89(5) defines the relevant class of Schedule I substances as "[a]ny material, compound, *mixture*, or preparation that contains any quantity of the [listed] substances[.]" N.C. Gen. Stat. § 90-89(5) (emphasis added). Methylone and 4-Methylethcathinone, the substances found in the bag in Defendant's residence, are included in Subsection (5)(j) of N.C. Gen. Stat. § 90-89 as Schedule I controlled substances.

Defendant argues that, based on the words used by the General Assembly in subsection (5) of N.C. Gen. Stat. § 90-89, it is the *mixture* that is the Schedule I substance, not the individual listed substances therein. Essentially, Defendant contends that because the "Methylone" and "4-Methylethcathinone" were found in the *same mixture*, they constitute a single Schedule I controlled substance for purposes of criminal prosecution. As Defendant's argument goes, had the General Assembly intended for these two substances found in the same mixture to be punishable as two separate offenses, the General Assembly would have described a Schedule I substance to include "any of the following substances found in a mixture," rather than to include "any mixture [] that contains" the listed substances. While Defendant's argument may have

<sup>1.</sup> To the extent that it may be necessary to correct any jurisdictional defect due to Defendant's failure to properly preserve grounds for his appeal, we hereby invoke Rule 2 of the North Carolina Rules of Appellate Procedure to address the merits of Defendant's appeal. Defendant's petition for certiorari is therefore denied.

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some logical appeal, we hold that Defendant was properly subject to prosecution for two separate offenses.

We note that our Court has already rejected the argument advanced by Defendant in another case where our Court affirmed a defendant's convictions of possession of ecstasy and possession of ketamine, where the ecstasy and ketamine were in the same pill. State v. Hall, 203 N.C. App. 712, 716-18, 692 S.E.2d 446, 450-51 (2010). In Hall, the defendant argued that she could not be sentenced for possession of both ecstasy and ketamine because the statutes in question "[did] not allow the State to charge separate offenses when there is a mixture." Id. at 717, 692 S.E.2d at 450. We rejected this argument, reasoning as follows:

Defendant's argument misses the mark. The quantity of ecstasy and ketamine contained in each pill found in Defendant's possession was irrelevant to Defendant's convictions. Any amount of ecstasy and any amount of ketamine found in Defendant's possession would have been sufficient to charge Defendant with possession of both controlled substances. . . . A person will be deemed "to possess" ecstasy if that person is in possession of "[a]ny ... mixture ... which contains any quantity of [ecstasy]." Likewise, a person is considered "to possess" ketamine if that person is in possession of "[a]ny . . . mixture . . . which contains any quantity of . . . Ketamine." Neither the presence nor the amount of ecstasy contained in each pill had any bearing on Defendant's conviction for possession of ketamine, and vice versa. Accordingly, the double jeopardy protections of the Fifth Amendment were not implicated in this instance.

Id. at 717-18, 692 S.E.2d at 451 (internal citations omitted).

As in the present case, the applicable statutes in *Hall* both defined the controlled substance as "any . . . mixture . . . which contains any quantity of [the relevant substance]"; however, we nonetheless concluded that the defendant could be punished for two offenses where two different drugs are found in the same "material, compound, mixture, or preparation." *Id.* Defendant's argument, while creative, ignores the quantitative element of the statute: possession of "[a]ny material, compound, mixture, or preparation that contains *any quantity*" of a Schedule I controlled substance is sufficient to charge a defendant with possession of the particular substance and to support a conviction for possession of the substance. N.C. Gen. Stat. § 90-89(5); *see Hall*, 203 N.C. App. at 717-18, 692 S.E.2d at 451.

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Defendant contends that *Hall* is distinguishable because the defendant in *Hall* was convicted of possession of a Schedule I substance and a Schedule III substance, rather than two Schedule I substances. However, we do not believe that the Court's reasoning in *Hall* is limited to a situation where a person may be convicted for possession of two controlled substances listed in separate schedules – it is equally applicable where a defendant is convicted of possession of two separate, distinct Schedule I substances. Applying the reasoning in *Hall* to the present case, we must conclude that "neither the presence nor the amount of [Methylone] contained in [the bag] had any bearing on Defendant's conviction for possession of [4-Methylethcathinone], and *vice versa*." *See id.* at 718, 692 S.E.2d at 451.

# B. Motion to Suppress

**[2]** Defendant's second argument on appeal relates to the trial court's denial of his second motion to suppress based on the doctrine of collateral estoppel.

After Defendant was indicted for PWIMSD 4-Methylethcathinone following his first appeal to this Court, he filed a motion to suppress in the trial court which was practically identical to the motion to suppress he filed after he was first – incorrectly – indicted for PWIMSD Methylethcathinone. When Defendant filed the first motion to suppress, the trial court held a full hearing, during which it received evidence and ultimately denied the motion. In its ruling on Defendant's *second* motion to suppress, the trial court noted that the second motion "relate[d] to the same chain of events and same transaction and occurrence as [the first motion to suppress] and relate[d] to the same issues."

Collateral estoppel precludes parties from "retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (internal marks omitted). The doctrine of collateral estoppel applies to both civil and criminal actions. *Sealfon v. United States*, 332 U.S. 575, 578 (1948). Proper application of collateral estoppel requires: (1) the same parties, (2) the same issue, (3) that the issue was raised and actually litigated in the prior action, (4) that the issue was material and relevant to the disposition of the prior action, and (5) that the determination of the issue was necessary and essential to the prior judgment. *State v. Dial*, 122 N.C. App. 298, 306, 470 S.E.2d 84, 89 (1996) (citing *King*, 284 N.C. at 358, 200 S.E.2d at 806).

It may be true, as Defendant argues, that the trial court had no jurisdiction over the PWIMSD 4-Methylethcathinone charge during

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the suppression hearing held prior to the first appeal to this Court. However, "collateral estoppel" involves "issue preclusion," not "claim preclusion." The issue in the second suppression hearing was the same as the issue decided in the first suppression hearing regarding Defendant's possession of Methylone; namely, whether the *bag* was lawfully discovered. When our Court vacated Defendant's conviction for PWIMSD Methylethcathinone, it left Defendant's conviction for PWIMSD Methylone undisturbed, which included the trial court's conclusion that the bag was lawfully discovered.

Therefore, the trial court properly applied the doctrine of collateral estoppel when it denied Defendant's second motion to suppress because: (1) the parties were the same, (2) the issues raised by the motion to suppress were the same – whether the bag containing the powdery substance was lawfully obtained from Defendant's residence, (3) the issues raised were raised and fully litigated during the trial court's hearing on Defendant's first motion to suppress, (4) the issue was material and relevant to the disposition of the prior action, and (5) the trial court's determination was necessary and essential to the final judgment – Defendant's conviction of PWIMSD Methylone.

Accordingly, we conclude that the trial court properly denied Defendant's second motion to suppress based on collateral estoppel.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

[252 N.C. App. 237 (2017)]

NOEL THOMPSON, PETITIONER v.
TOWN OF WHITE LAKE, RESPONDENT

No. COA16-104

Filed 7 March 2017

# 1. Appeal and Error—interlocutory motion—zoning—nothing left to be resolved

Petitioner's appeal in a zoning case was not interlocutory where the superior court fully resolved the merits of the parties' dispute and remanded the matter only for the municipal zoning board to schedule petitioner's compliance with her permit. The decision left nothing more to be resolved in the superior court.

# 2. Zoning—review by trial court—standard

The superior court used the wrong standard of review and entered its own findings in a zoning case involving a storage building allegedly intended for commercial use in a residential neighborhood. The whole record review applied to the superior court's review of the municipal zoning board's findings and inferences and de novo review applied to the board's conclusions of law and interpretation of the ordinance. The superior court's language and the act of finding facts made clear that it applied the de novo standard to all the issues in dispute, including the board's findings and inferences.

# 3. Zoning—review by trial court—contradiction of Board finding

The superior court's finding that a storage building was constructed in contradiction with a zoning permit contradicted the municipal zoning board's finding and substituted an alternative basis for a stop work order and notice of intent. The superior court may not substitute its own justification for that of the board with regard to findings and inferences from the evidence where a challenge is based upon whether substantial evidence exists to support the board's decision.

Appeal by Petitioner from an order entered 14 May 2015 by Judge James Gregory Bell in Bladen County Superior Court. Heard in the Court of Appeals 7 June 2016.

Morningstar Law Group, by William J. Brian, Jr. and Jeffrey L. Roether, for Petitioner-Appellant.

[252 N.C. App. 237 (2017)]

Hester, Grady & Hester, P.L.L.C., by H. Clifton Hester, for Respondent-Appellee.

INMAN, Judge.

This appeal arises from a zoning dispute. Because the superior court misapplied a *de novo* standard of review and entered new findings of fact contrary to a municipal zoning board's findings, the judgment must be reversed. Also, because the appellee concedes that the record evidence did not support the municipal zoning board's only finding of fact supporting its decision, the board's decision must be reversed.

Noel Thompson ("Petitioner") appeals from an order by the trial court affirming a zoning decision by the Town of White Lake Board of Adjustment (the "Board") that stopped Petitioner from completing construction of a storage building in a residential neighborhood. Petitioner asserts the Board's decision was not supported by competent evidence and misinterpreted the local zoning ordinance. Petitioner also contends the superior court applied the incorrect standard of review to the Board's decision. Respondent, the Town of White Lake (the "Town"), asserts that the superior court applied the correct standard of review and that its judgment should be affirmed. After careful review, we reverse the trial court's judgment as well as the Board's decision.

# **Factual and Procedural History**

Petitioner is the owner of real property located at 1431 Highway 53 East (the "Property") in the Town of White Lake, North Carolina. The Property is zoned as an R-1, residential zoning district. The Town's zoning ordinance (the "Ordinance") provides that a person may construct an accessory storage structure on residential property by obtaining a zoning permit from the Town, which will be issued so long as the structure conforms to the Ordinance and the construction conforms to the issued permit.

On 13 March 2014, Petitioner obtained a zoning permit (the "Permit") from the zoning inspector for the Town, Timothy Frush (the "Zoning Inspector"). The Permit allowed Petitioner to construct a 24'x40' tan, metal storage building on her property for residential purposes. The Permit further specified the Building would have four doors, all facing away from the street. Petitioner proceeded to construct a building (the "Building") with eight doors, including four facing the street.

In response to complaints about the Building under construction, the Zoning Inspector investigated and found two deviations from the

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Permit: (1) the Building had four doors on each side, and (2) the Building had a center dividing wall, which created eight separate 10'x12' units within the whole structure. On 7 April 2014, the Zoning Inspector issued a stop work order (the "Stop Work Order") for the construction of the Building and on 16 April 2014 sent Petitioner a notice of intent to revoke the Permit (the "Notice of Intent"). In the Notice of Intent, the Zoning Inspector cited three reasons that the Building violated the Ordinance:

- The accessory structure is a commercial structure and is inconsistent with the R-1 zoning permit authorization granted by the Town of White Lake. (Article V, 5-1.2)
- The permit recipient failed to develop or maintain the property in accordance with the approved plans. (Article V, 5-6.1)
- The accessory structure is not located behind the front building line of the principle structure. (Article XII, 12-7(A)[sic]

Petitioner appealed the Stop Work Order and Notice of Intent to the Board. After an open meeting which included testimony by the Zoning Inspector and Petitioner, the Board affirmed the Zoning Inspector's decision on the first of the three allegations: that "[t]he accessory structure is a commercial structure and is inconsistent with the R-1 zoning permit authorization . . . . " The Board unanimously voted that "[b]ased on the evidence provided, the allegation is: Valid." The Board rejected the Zoning Inspector's other two allegations—that Petitioner "failed to develop or maintain the property . . . in accordance with the approved plans" and that "[t]he accessory structure is not located behind the front building line of the principle structure." The Board voted unanimously that each of those grounds was "[e]rroneous and not supported in fact or under the applicable provisions of the White Lake Zoning Ordinance as alleged by the [Zoning Inspector]." The Board concluded its decision with a comment that "the most serious violation (That the structure would be used for commercial purposes[]) was valid and was sufficient to support the action of revoking the permit."

Petitioner appealed the Board's decision to the Superior Court of Bladen County, arguing, *inter alia*, that (1) the Zoning Inspector presented no competent evidence to support the Board's finding that the Building would be used for commercial purposes, and (2) the Board erred as a matter of law by affirming the Stop Work Order and Notice of Intent pursuant to Article V, 5-1.2 of the Ordinance.

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On 14 May 2015, the superior court entered an order affirming the Board's decision. The superior court entered findings of fact including, *inter alia*, that although the Permit approved a building with only four exterior doors facing the residential side of the structure and no internal dividing walls, "[t]he actual structure . . . contained [eight] doors and [eight] separate rooms, each with a separate door." The superior court further found that

the actual structure (a mini-storage building with [eight] separate compartments/rooms with [four] street-side doors) [was] not a permissible 'Accessory Use' structure incidental to a residential use as those terms are defined by the White Lake Zoning Ordinance. Furthermore, the [Building], as originally represented by the petitioner (a one-room storage building with [four] doors facing the residence), would have been a permissible 'Accessory Use' structure as defined by the ordinance.

The superior court concluded that the deviation from a one-room structure with four doors to an eight-room structure with eight doors sufficiently diverged from the Permit to support the Stop Work Order and Notice of Intent. The superior court also concluded the Building was not an "Accessory Use" structure incidental to the primary residence, but rather was a "commercial use 'structure' as defined by the ordinance and was not consistent with the R-1 residential use of the lot in question." The superior court did not cite any provision in the Ordinance defining a commercial structure. The superior court affirmed the Board's decision and remanded the matter to the Board to determine a schedule for Petitioner's compliance with the Permit.

Petitioner timely appealed the superior court's order.

# **Analysis**

#### I. The Town's Motion to Dismiss

[1] As an initial matter, we address the Town's Motion to Dismiss Petitioner's appeal as interlocutory. The Town asserts the Notice of Intent was not an actual revocation of the Permit, and because Petitioner asserted revocation as grounds for her appeal, we should dismiss the appeal. We disagree.

A party in a civil action has a right of appeal to this Court "[f]rom any final judgment of a superior court[,]  $\dots$  [or f]rom any interlocutory order or judgment of a superior court  $\dots$  that  $\dots$  [a]ffects a substantial right[.]"

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N.C. Gen. Stat. § 7A-27(b) (2015). <sup>1</sup> "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted). "An order that completely decides the merits of an action therefore constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues such as attorney's fees and costs." *Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381.

Here, the superior court fully resolved the merits of the parties' dispute and remanded the matter only for the Board to schedule Petitioner's compliance with her Permit. The superior court fully decided the issues in dispute: (1) whether the Building complied with the Ordinance and (2) whether the Board was correct in affirming the Stop Work Order and Notice of Intent. So while the revocation may not have occurred yet, the superior court determined the Building's non-compliance with the Ordinance and the Board's justification for affirming the notices and remanded the matter for Board proceedings that would lead either to compliance by Petitioner or revocation of the Permit with no further determination by the superior court. The superior court also ordered Petitioner to pay court costs associated with the matter, further indicating the finality of the judgment. The decision left nothing more to be resolved in the superior court. Accordingly, we hold the superior court's order was a final order for the purposes of this appeal.

### II. The Superior Court's Review

#### A. Standard of Review

"An appellate court's review of the trial court's zoning board determination is limited to determining whether the superior court applied the correct standard of review, and to determine whether the superior court correctly applied that standard." *Overton v. Camden Cnty.*, 155 N.C. App. 391, 393-94, 574 S.E.2d 157, 160 (2002) (citation omitted).

When the superior court hears a decision from a board of adjustment, it "sits as an appellate court, and not as a trier of facts[.]"

 $<sup>1.\,</sup>$  N.C. Gen. Stat.  $\S$  7A-27 was amended in 2016; however, this amendment does not affect the cited language.

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Sun Suites Holdings, LLC v. Bd. of Alderman of Town of Garner, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527 (2000) (quoting Tate Terrace Realty Investors, Inc. v. Currituck Cnty., 127 N.C. App. 212, 217, 488 S.E.2d 845, 848 (1997)). The superior court's review is limited to determinations of whether:

1) the [b]oard committed any errors in law; 2) the [b]oard followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the [b]oard's decision was supported by competent evidence in the whole record; and 5) [whether] the [b]oard's decision was arbitrary and capricious.

Overton, 155 N.C. App. at 393, 574 S.E.2d at 159 (alterations in original) (quoting Capital Outdoor, Inc. v. Guilford Cnty. Bd. of Adjustment, 152 N.C. App. 474, 475, 567 S.E.2d at 441 (citation omitted)).

The proper standard of review for the superior court "depends upon the particular issues presented on appeal." *Amanini v. N.C. Dep't of Human Res.*, *N.C. Special Care Ctr.*, 114 N.C. App. 668, 374, 443 S.E.2d 114, 118 (1994) (citation omitted). "If a petitioner contends the [b]oard's decision was based on an error of law, 'de novo' review is proper." *JWL Invs.*, *Inc. v. Guilford Cnty. Bd. of Adjustment*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717 (1999). "When the petitioner 'questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.' "*ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993)).

"Under a *de novo* review, the superior court 'consider[s] the matter anew[] and freely substitute[es] its own judgment for the agency's judgment.' "Mann Media Inc. v. Randolph Cnty. Planning Bd., 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (2002) (alterations in original) (quoting Sutton v. N.C. Dep't. of Labor, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)). "The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' "Amanini, 114 N.C. App. at 674, 443 S.E.2d at 118 (citation omitted). "[T]he 'whole record' test 'gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence[,]' "Bennett v. Hertford Cnty. Bd. of Educ., 69 N.C. App. 615, 618, 317 S.E.2d 912, 915 (quoting Overton v. Goldsboro City Bd. of Educ., 304

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N.C. 312, 322, 283 S.E.2d 495, 501 (1981)), but "does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*," *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). "It is not the function of the reviewing court . . . to find facts, but instead, . . . to determine if the findings made by the [b]oard are supported by the evidence." *JWL Invs.*, 133 N.C. App. at 429, 515 S.E.2d at 717 (citation omitted).

#### B. Discussion

[2] We now consider whether the superior court applied the appropriate standards of review to the Board's determination of the Notice of Intent and Stop Work Order, and if so, whether the superior court applied the standards correctly. We start with the issues presented to the superior court on appeal from the Board's decision.

In her petition for writ of certiorari to the superior court, Petitioner contended:

- 28. The findings, inferences, conclusion and decisions of the Board that the storage building is a commercial structure inconsistent with the R-1 zoning permit authorization granted by the Town are not supported by substantial competent evidence in view of the entire record.
- 29. The Board's findings, inferences, conclusions and decisions were arbitrary and capricious.

. . .

31. The Board's decision violates N.C. Gen. Stat. § 160A-381 in that the Board failed to interpret the Ordinance in a manner that promotes the health, safety, morals and general welfare of the community.

Petitioner's contentions implicate both *de novo* and whole record standards of review. " '[A] court may properly employ both standards of review in a specific case.' " *Mann Media*, 356 N.C. at 15, 565 S.E.2d at 18 (quoting *Sun Suites*, 139 N.C. App. at 273, 533 S.E.2d at 528). "However, the standards are to be applied separately to discrete issues, and the reviewing superior court must identify which standard(s) it applied to which issues[.]" *Id.* (internal quotation marks and citations omitted). In this case, whole record review applies to the Board's findings and

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inferences and *de novo* review applies to the Board's conclusions of law and interpretation of the Ordinance.

The superior court's judgment described the standard of review as follows:

Based upon the facts, the [c]ourt concludes that there are questions of law presented. The [c]ourt should apply a *de novo* standard of review to Board decisions involving application and interpretation of zoning ordinances.

But the superior court also made its own findings of facts based "[u]pon reviewing the evidence and hearing argument of Counsel[.]" The superior court's language and the act of finding facts makes clear it applied a *de novo* standard to all issues in dispute, including the Board's findings and inferences. The superior court did not apply the whole record standard to the Board's findings as required by the issues presented by Petitioner. Nor did the superior court acknowledge the distinction between the issues of fact and issues of law before it.

The Board's decision was not a model of clarity for judicial review. Following the recital of the issues before it, the Board's decision states as follows: "Having heard all of the evidence and arguments presented at this hearing, the Board made the following FINDINGS OF FACT and drew the following CONCLUSIONS" and next states: "There is substantial evidence in the record to show the following Facts and Conclusions." With respect to the allegation on which it affirmed the Zoning Inspector and denied Petitioner's appeal, the Board's decision indicates that its members unanimously voted that "[b]ased on the evidence provided, the allegation is: Valid."

Article II of the Ordinance, titled "Interpretations and Definitions," does not define the term "commercial structure" or the word "commercial." It provides that "[w]ords not defined in this Ordinance shall be given their ordinary and common meaning." Town of White Lake, N.C., Zoning Ordinance, Art. II, § 2-2.1 (2011). The Town on appeal refers to the "finding" by the Board that "the structure *would* be used for commercial purposes," and comments that "the word 'could' was probably intended by the Board." In addition to the Town's reference on appeal to this determination as a finding of fact, before the Board, counsel for

<sup>2.</sup> The record indicates, however, that Petitioner's counsel urged Board members to consider only the proven purpose for the Building rather than whether it "could" be used for commercial purposes. The record indicates no effort by the Town to correct the Board's word choice in its finding.

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the Town and for Petitioner addressed the dispute regarding the nature of the Building as an issue of fact. $^3$ 

In their deliberations on Petitioner's appeal in open session, Board members discussing the allegation that the Building was a commercial structure did not refer to the scope or meaning of the Ordinance. Before voting commenced, one member commented that "if you vote that it's valid which means that means [sic] you are supporting what the zoning officer has said in his letter that the accessory structure is a commercial structure and is inconsistent with R1 zoning permit authorized." Each member voted that the allegation was valid. While the language of the Board's decision was not clear, considered in the context of the record, the determination that the Building is a commercial structure arose from the Board members' consideration of evidence presented and inferences drawn from the evidence.<sup>4</sup> As such, it required a whole record review by the superior court, and the superior court was prohibited from substituting its findings for the findings of the Board.

The parties agree that the Board's only factual justification to affirm the Stop Work Order and the Notice of Intent—"That the structure would be used for commercial purposes"—was not supported by the evidence. The Town concedes on appeal that "there is no evidence of the Petitioner's intended use for commercial purposes." But the Town seeks to classify the Board's decision and subsequently the superior court's decision regarding the character of the building as an issue of law requiring a *de novo* review. This argument is inconsistent with the record and the language of the Board's decision.

<sup>3.</sup> Petitioner testified that her intended use of the Building was "strictly personal." She testified that she had no plans to rent the Building or any portion of it for storage by others. She acknowledged that some of the items she planned to store in the Building were used in her vacation rental properties, but also said the storage would include "some things I put in my own house." The Town presented hearsay evidence of several complaints the Zoning Inspector had received protesting the Building or rental of storage units in Petitioner's neighborhood. Petitioner's counsel argued to the Board that "a commercial structure is a structure that is used to make money," and noted that no evidence had been presented showing that Petitioner intended to make money from the Building. The Town's counsel argued to the Board that it needed to determine, *inter alia*, "[t]he specific use of which the building is intended."

<sup>4.</sup> Likewise, the Board's determination that the Zoning Inspector's other two allegations were erroneous arose at least in part from findings of fact by the Board. Neither Petitioner, who prevailed on those issues before the Board, nor the Town appealed those determinations. They were therefore not subject to review by the superior court and are not subject to review by this Court.

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[3] The Town asserts that the Board's finding that "[t]he accessory structure is a commercial structure and is inconsistent with the R-1 zoning permit authorization granted by the Town of White Lake" supports the superior court's application of a de novo review because consistency with the R-1 zoning permit requires an interpretation of the Ordinance, *i.e.*, an issue of law. This argument is refuted by the record of the Board's determination that the evidence presented did not support the Zoning Inspector's allegation that "[t]he permit recipient failed to develop or maintain the property . . . in accordance with the approved plans." The Board affirmed the Stop Work Order and Notice of Intent based solely on the allegation that the Building would be used "for commercial purposes." The superior court may not substitute its own justification for that of the Board with regard to findings and inferences from the evidence where a challenge is based upon whether substantial evidence exists to support the Board's decision. Thompson, 292 N.C. at 410, 233 S.E.2d at 541. The superior court, in finding that the Building was constructed inconsistent with the Permit, contradicted the Board's finding that such allegation was erroneous and substituted an alternative basis to affirm the Stop Work Order and Notice of Intent.

Ordinarily when a superior court applies the wrong standard of review to a municipal board decision, this Court vacates the superior court judgment and remands for proper application of the correct standard. See Sutton, 132 N.C. App. at 389, 511 S.E.2d at 342. But we need not do so in this case because the Town, in its brief before this Court, concedes that the Board's factual finding necessary for the decision challenged on appeal was not supported by the evidence. In the interest of judicial economy, we conclude remand to the superior court is unnecessary. See Mann Media, 356 N.C. at 15-16, 565 S.E.2d at 18-19; Sun Suites, 139 N.C. App. at 274, 533 S.E.2d at 528-29.

#### Conclusion

Because the superior court applied the wrong standard of review and entered its own findings inconsistent with the Board's findings, and because the parties agree the evidence did not support the Board's determination that the Building would be used for commercial purposes, we reverse both the superior court's decision and the Board's decision.

REVERSED.

Judges BRYANT and TYSON concur.

[252 N.C. App. 247 (2017)]

THE TIMES NEWS PUBLISHING COMPANY D/B/A TIMES-NEWS, PLAINTIFF

v.

THE ALAMANCE-BURLINGTON BOARD OF EDUCATION, D/B/A ALAMANCE-BURLINGTON SCHOOLS OR THE ALAMANCE-BURLINGTON SCHOOL SYSTEM; & DR. WILLIAM HARRISON, IN HIS CAPACITY AS INTERIM SUPERINTENDENT OF ALAMANCE-BURLINGTON SCHOOL SYSTEM, DEFENDANTS

No. COA16-588

Filed 7 March 2017

# Open Meetings—closed sessions—minutes—redacted—general account

In a case in which a newspaper sought to obtain an unredacted version of the minutes of closed sessions of a board of education, the trial court correctly determined that only certain portions of the minutes were subject to disclosure. The newspaper argued that even where minutes have been properly redacted, the Open Meetings Law requires a public body to create and make public a general account of the redacted portions with sufficient detail that members of the public would be able to reasonably understand what transpired at the meeting. However, where a public body has kept minutes which are sufficient to give someone not in attendance a reasonable understanding of what transpired, the public body has met its burden to create a general account.

#### 2. Open Meetings—closed sessions—minutes—properly redacted

Portions of board of education closed session minutes were properly redacted by the trial court. N.C.G.S. § 143-318.10(e) states that both minutes or an account of a closed session may be withheld from public inspection so long as public inspection would frustrate the purpose of the closed session.

Appeal by Plaintiff from order entered 16 December 2015 by Judge Michael O'Foghludha in Alamance County Superior Court. Heard in the Court of Appeals 19 October 2016.

The Bussian Law Firm, by John A. Bussian, for the Plaintiff-Appellant.

Tharrington Smith, LLP, by Deborah R. Stagner and Neal A. Ramee, for the Defendants-Appellees.

Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin, for amicus curiae North Carolina Press Association.

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Christine T. Scheef and Allison B. Schafer, for amicus curiae N.C. School Boards Association.

DILLON, Judge.

The Times News Publishing Company ("Times News"), a publisher of a daily newspaper, originally brought this action seeking an order compelling the Alamance-Burlington Board of Education (the "Board") to provide unredacted minutes of a series of closed sessions of the Board. Times News appeals an order in which Judge O'Foghludha determined that only certain portions of the minutes were subject to disclosure. We affirm Judge O'Foghludha's order.

#### I. Background

In 2011, Dr. Lillie Cox was hired by the Board to serve as the superintendent of the Alamance-Burlington School System. In May 2014, during a closed session of the School Board, Dr. Cox resigned her position as superintendent. The Board agreed to pay her \$200,000 as a severance payment and \$22,000 in unused vacation pay.

In October 2014, Times News submitted a written request to the Board seeking access to the minutes from certain closed sessions, including the May 2014 closed session, "pursuant to the Public Records Act." Times News specifically requested disclosure of unredacted minutes of "specially called meeting[s], including any closed sessions in or about May of 2014 relating to the continued employment of the then current Superintendent of Schools." In response, the Board produced forty-five (45) pages of heavily redacted minutes of closed sessions held between March and May 2014.

Times News subsequently commenced this action, seeking a court order compelling the Board to produce the meeting minutes in their unredacted form, alleging that the Board had violated the Open Meetings Law and the Public Records Act by failing to produce the minutes. In response, the Board filed a motion to dismiss and an answer, claiming that the redacted portions of the meeting minutes consisted of confidential personnel information and information protected by attorney-client privilege.

The trial court granted the Board's motion to dismiss, concluding that "the records sought by [Times News] [were] not public records subject to disclosure under the Public Records Act." Times News appealed the trial court's grant of the Board's motion to dismiss to this Court in December 2014.

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In Times News's first appeal, our Court reversed the trial court's ruling, holding that a trial court presented with an Open Meetings Law claim concerning closed meeting minutes "must review the minutes in camera—meaning in private, not in open court—and 'tailor the scope of statutory protection in each case' based on the contents of the minutes and their importance to the public." Times News Publ'g Co. v. Alamance-Burlington Bd. of Educ., \_\_\_\_ N.C. App. \_\_\_\_, \_\_\_, 774 S.E.2d 922, 924 (2015) (quoting News & Observer Publ'g Co. v. Poole, 330 N.C. 465, 480, 412 S.E.2d 7, 16 (1992)).

On remand from the first appeal, the Board submitted the full unredacted minutes from the May 2014 closed session and other sessions to the trial court for *in camera* review. In its December 2015 Order, the trial court found that only one previously redacted paragraph from the minutes was subject to disclosure, ruling as follows:

6. With the exception of the first paragraph on the last page of the minutes, the redacted material was properly withheld as containing personnel information related to Dr. Cox and other employees, and discussions protected by the attorney-client privilege. The first paragraph on the [last]<sup>1</sup> page contains a discussion of the policies of the Board, and that paragraph should therefore not be withheld from public inspection.

. . . .

- 8. With the exception of the first paragraph on the last page of the minutes, public inspection of the unredacted minutes would frustrate the dual purposes of the closed sessions.
- 9. The first paragraph on the last page of the minutes concerns a policy issue which must be public.

Times News timely filed notice of appeal of the December 2015 Order, resulting in the appeal presently before this Court.

#### II. Analysis

[1] As in the first appeal, our consideration of this appeal requires us to address the interplay between two state laws enacted to ensure public

<sup>1.</sup> The trial court's order refers to the "first paragraph on the first page" in this finding. It appears from the record and the other findings in the trial court's order that this was in error.

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access to government records – the Open Meetings Law and the Public Records Act. *Times News*, \_\_\_ N.C. App. at \_\_\_\_, 774 S.E.2d at 925.

The Public Records Act recognizes that public records and public information are generally open to inspection by the public, *see* N.C. Gen. Stat. § 132.1(b) (2013), but it does have narrow exceptions, such as information protected by attorney-client privilege, personnel information, or confidential matters concerning students. N.C. Gen. Stat. 143-318.11 (a)(1), (3), (6) (2013); *Times News*, \_\_\_ N.C. App. at \_\_\_, 774 S.E.2d at 925. For instance, personnel records created by a local board of education are not subject to public inspection under the Public Records Act. *Id*.

The Open Meetings Law permits a public body to hold "closed sessions" – sessions not open to the public – in limited situations. *Id.*; *see* N.C. Gen. Stat. § 143-318.11. For instance, a closed session is allowed in order to (1) prevent the disclosure of non-public information, (2) allow a public body to consult with its attorney and preserve the attorney-client privilege, and (3) allow a public body to confidentially consider individual personnel issues. N.C. Gen. Stat. § 143-318.11(a). The Open Meetings Law further requires that "[e]very public body . . . keep full and accurate minutes of all official meetings, including any closed sessions." N.C. Gen. Stat. § 143-318.10(e). These minutes are considered public records under the Public Records Act, but may be withheld from public inspection where "public inspection would frustrate the purpose of a closed session." *Times News*, \_\_\_ N.C. App. at \_\_\_, 774 S.E.2d at 925 (quoting N.C. Gen. Stat. § 143-318.10).

The relevant statute, N.C. Gen. Stat.  $\S$  143-318.10, provides as follows:

Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11. Such minutes may be in written form or, at the option of the public body, may be in the form of sound or video or sound recordings. When the public body meets in closed session, it shall keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. Such accounts may be written narrative, or video or audio recordings. Such minutes and accounts shall be public records within the meaning of the Public Records Law, [] provided, however, that minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection

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so long as public inspection would frustrate the purpose of a closed session.

N.C. Gen. Stat. § 143-318.10(e) (emphasis added).

In this appeal, Times News argues that even where minutes have been properly redacted, the Open Meetings Law requires a public body, such as the Board, to create and make public a "general account" of the redacted portions with sufficient detail such that members of the public would be able to "reasonably understand what transpired" at the meeting. See N.C. Gen. Stat. § 143-318.10(e). Essentially, Times News contends that a "general account" of a closed session created pursuant to N.C. Gen. Stat. § 143-318.10(e) is separate from the actual minutes of the session, and further contends that even if the minutes themselves might not be subject to public inspection, the general account is subject to public inspection. We disagree with this interpretation of the Open Meetings Law.

The plain language of the Open Meetings Law provides that "every public body shall keep full and accurate *minutes*" of a closed session. The statute also provides that a public body "shall keep *a general account*" of a closed session. Our Court has previously delineated the differences between "minutes" and a "general account" as follows:

The purpose of *minutes* is to provide a record of the actions taken by a board and evidence that the actions were taken according to proper procedures. If no action is taken, no minutes (other than a record that the meeting occurred) are necessary. The purpose of a *general account*, on the other hand, is to provide some sort of record of the discussion that took place in the closed session, whether action was taken or not. A public body must always prepare a general account of a closed session, even if minutes of that closed session are unnecessary. As a practical matter, *the general account of a meeting at which action is taken will usually serve as the minutes of that meeting as well*, if the account includes a record of the action.

*Multimedia Publ'g of N. Carolina, Inc. v. Henderson Cnty.*, 145 N.C. App. 365, 372–73, 550 S.E.2d 846, 851 (2001) (emphasis added).

In accordance with *Multimedia*, we hold that where a public body has kept minutes which are sufficient to give someone not in attendance "a reasonable understanding of what transpired," the public body has met its obligation to create a "general account." *Multimedia* 

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Publ'g, 145 N.C. App. at 372–73, 550 S.E.2d at 851. We note that Times News has not challenged the trial court's conclusion of law in its 2015 Order that "the minutes of the closed session . . . do comply with the statutory requirement."

[2] Further, we hold that the statute is unambiguous in allowing a public body to prohibit public inspection of any portion of minutes or a "general account" of a closed session where disclosure would "frustrate the purpose of [the] closed session." See State v. Hooper, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) ("The first step in determining a statute's purpose is to examine the statute's plain language. Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning."). Specifically, N.C. Gen. Stat. § 143-318.10(e) states that both "minutes or an account of a closed session . . . may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session." N.C. Gen. Stat. § 143-318.10(e). Our Supreme Court has recognized that the non-disclosure provision in the Open Meetings Law is an exception to the Public Records Act. News & Observer v. Poole, 330 N.C. at 480, 412 S.E.2d at 16.

Here, the trial court redacted the majority of the forty-five (45) pages of minutes, noting that "the redacted material was properly withheld as containing personnel information related to Dr. Cox and other employees, [] discussions protected by the attorney-client privilege[,]" and confidential student information.

A trial court's findings, based on *in camera* review, regarding whether a public body's closed session minutes comply with the Open Meetings Law and the Public Records Act are conclusions of law, *Multimedia Publ'g*, 145 N.C. App. at 370, 550 S.E.2d at 850; therefore, the proper standard for appellate review is *de novo*.

We have carefully reviewed the unredacted minutes submitted under seal to this Court and conclude that the undisclosed portions were properly redacted by the trial court on remand. We also agree with the trial court that the first paragraph on the last page of the minutes concerns a policy issue which must be disclosed to the public. Accordingly, we affirm the trial court's order in its entirety.

#### AFFIRMED.

Judges ELMORE and HUNTER, JR., concur.

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ALONZA H. WARD, JR. AND MARIE W. WARD, PLAINTIFFS v. LAURA C. WARD, DEFENDANT

No. COA16-832

Filed 7 March 2017

# 1. Real Property—partition—implied-in-fact contract—not found

The trial court did not err by partitioning a property by sale and dividing the proceeds equally, with plaintiff receiving one half of the maintenance expenses and taxes she had paid. The parties had separated and divorced without resolving ownership of the property, so that ownership was as tenants-in-common with defendant living in the house and paying the expenses. Although defendant contended that plaintiff Alonza Ward had waived his interest in the property through an implied-in-fact contract and that she was the sole owner of the property, the trial court found and concluded that there was neither a written agreement nor particular conduct or action sufficient to give rise to a contract implied-in-fact. There was competent evidence to support this finding, and the finding was sufficient to support the conclusion.

# 2. Real Property—partition—equities

The trial court did not err in a partitioning proceeding for real property where defendant contended that plaintiff Alonza Ward had invoked the court's equitable powers with unclean hands because of his adulterous affair with his co-petitioner. Although partition proceedings are equitable in nature, it is well settled that a trial court will deny a cotenant's right of partition only where there has been an express or implied agreement not to partition or where partition would make it impossible to fulfill the terms of the agreement. The adulterous relationship had no bearing on the equities associated with the partitioning of a marital home.

Appeal by defendant from order entered 5 February 2016 by Judge Robert F. Johnson in Dare County Superior Court. Heard in the Court of Appeals 9 February 2017.

Phillip H. Hayes, Jr. and Bradford J. Lingg for defendant-appellant.

Aldridge, Seawell & Hudspeth, LLP, by Paddison P. Hudspeth and Laura M. Twichell, for plaintiffs-appellees.

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MURPHY, Judge.

Laura Ward ("Laura") appeals from the 5 February 2016 Order partitioning real property. She contends that the trial court erred in concluding that an implied-in-fact contract did not arise through the conduct of the parties over the fifteen years preceding the filing of the petition to partition. She also argues that the trial court erred in failing to apply principles of equity relating to partitions. We disagree, and accordingly affirm the ruling below.

# **Factual Background**

Alonza Ward, Jr. ("Alonza") and Laura had been married for nearly six years when in 1973 they purchased as tenants by the entirety the property at issue – 2010 Edenton Street, Kill Devil Hills, North Carolina. At some point thereafter, Alonza had an affair with his current wife, Marie Ward ("Marie"). Alonza and Laura separated in 2000, and Laura continued to live in the home at the Edenton Street address with the couple's minor son. During that time, Laura paid all maintenance costs and property taxes associated with the home without support or contribution from Alonza. Alonza and Laura divorced in 2006 and share the property as tenants in common.

Between the time of their separation and divorce proceedings, Laura's lawyers sent three different letters to Alonza, proposing, *inter alia*, that he agree to convey all rights in the property to her. However, Alonza never responded to those letters, nor did he sign any document acknowledging their terms.

As part of their divorce proceedings in 2006, both parties sought equitable distribution of the marital estate. Laura sought an unequal distribution in her favor on the grounds that (1) she alone bore the expenses associated with the maintenance of the property after the couple's separation; and (2) Alonza abandoned the marital relationship. Their divorce was finalized on 6 July 2006, but Alonza's and Laura's claims for equitable distribution remained pending.

On 9 May 2007, the trial court scheduled an equitable distribution pretrial conference for 31 July 2007 and ordered Alonza and Laura to submit equitable distribution inventory affidavits by specified dates – 11 June 2007 for Alonza and 12 July 2007 for Laura. The trial court specifically noted that failing to file those affidavits or being unprepared to proceed at the pretrial conference would result in dismissal of the parties' claims for equitable distribution. On 9 June 2007, Alonza voluntarily dismissed his equitable distribution claim. Neither party filed

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an equitable distribution inventory affidavit or appeared for the pretrial conference. However, on 30 August 2011, Laura moved for summary judgment on her claim for unequal equitable distribution. Ultimately, Laura's claim was dismissed for failure to comply with the trial court's mandated deadlines. Laura appealed that decision to this Court, and we affirmed the dismissal.<sup>1</sup>

On 21 January 2015, Alonza and Marie jointly petitioned the Dare County Clerk of Superior Court for a partition by sale of the property, with the proceeds therefrom to be divided in proportion to Laura's and Alonza's respective interests in the home. Laura's response to the petition included a motion to dismiss Marie from the petition; a counterclaim for offset of the expenses she incurred maintaining the property; and affirmative defenses of waiver of the right to partition as well as estoppel. Specifically, Laura contended that Alonza waived his interest in the property through an implied-in-fact contract providing that she would remain in the home after he abandoned their marital relationship and property, and further that he should be estopped from violating his own agreement.

On 13 August 2015, the Dare County Clerk of Superior Court issued a ruling that Laura was not entitled to reimbursement from Alonza for maintenance and repairs, but should be compensated for the property taxes she paid. The Clerk also granted Alonza and Marie's petition, ordering the property be sold by private sale and the proceeds therefrom divided equally between Alonza and Laura. On 24 August 2015, Laura appealed the Clerk's order to the Dare County Superior Court.

On 19 November 2015, the Superior Court conducted a *de novo* hearing at which it considered testimony from Alonza, Laura, and their daughter, Christine Gray. On 5 February 2016, the trial court likewise ordered the property be partitioned by sale, with the proceeds equally divided between Alonza and Laura. The trial court also determined that Laura was entitled to reimbursement of one-half of all maintenance costs and property taxes she paid on the property since 6 July 2006. The trial court based this conclusion on the finding that there was neither a written agreement, nor conduct between the parties, that would give rise to either an implied-in-fact contract to transfer ownership of the property or to waive Alonza's right to partition. Laura timely appealed the order of partition to this Court.

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### Analysis

## I. Standard of Review

The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether those findings support the conclusions of law and ensuing judgment. *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176, *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). Competent evidence is evidence "that a reasonable mind might accept as adequate to support the finding." *Forehand v. Forehand*, 238 N.C. App. 270, 273, 767 S.E.2d 125, 128 (2014) (citation and quotation marks omitted). Upon determining that there is competent evidence to support the trial court's findings, this Court is bound by the trial court's findings of fact, even if there is evidence in the record that would sustain findings to the contrary. *Hensgen v. Hensgen*, 53 N.C. App. 331, 335, 280 S.E.2d 766, 769 (1981).

## II. Implied-in-Fact Contract

[1] Laura first argues that the trial court's finding that there was no implied-in-fact contract between her and Alonza is not supported by competent evidence. In particular, she takes issue with a portion of the court's twelfth finding of fact. In pertinent part, that finding states:

Having considered the evidence presented and having reviewed the cases tendered by counsel for both parties, the Court finds that the cases submitted by Respondent where the Court has upheld a contract implied in fact are not applicable here because those cases are factually distinguishable. In those cases finding a contract implied in fact there has been actual conduct or some written agreement between the parties. If there was an agreement that at least impliedly modified and limited the right of partition, such an implied agreement arose from some written agreement between the parties. In this case, there is no written agreement signed by the parties that implied any agreement between the parties to waive the right to partition or to transfer ownership of the property. There was no particular conduct or action taken by either party that suggests an implied in fact contract to waive partition or transfer ownership. Rather, there were actions taken by both parties contrary to an implied agreement and indicative of a continuing dispute between the parties concerning the division of the property. . . . It appears,

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by greater weight of the evidence, that there was no agreement between the parties concerning the division of the property.  $^2$ 

Laura contends the trial court's assertion that "a petition to partition can only be denied if there is some written agreement between the parties" is incorrect. She also disagrees with the trial court's supposition that a contract implied-in-fact did not arise pursuant to the parties' conduct over the fifteen years preceding the filing of the petition to partition.

As a preliminary matter, Laura misapprehends the trial court's finding. The trial court does not state that a petition to partition will be denied *only* if a written agreement exists between the parties. Instead, it correctly identifies two means of establishing a contract implied-infact: "[A]ctual conduct *or* some written agreement between the parties." (Emphasis added). The trial court then went on to analyze both grounds before it ultimately found that there was neither written agreement nor "particular conduct or action taken by either party" that would reveal the existence of an implied-in-fact contract.

In determining whether the trial court's finding was in error, we must first examine a cotenant's rights in regard to partitions. Generally, a tenant in common retains the right to have the court physically partition any real estate in which he has an interest such that he may enjoy his share. N.C.G.S. § 46-3 (2015); *Kayann Props., Inc. v. Cox*, 268 N.C. 14, 19, 149 S.E.2d 553, 556 (1966). If there is no way to physically partition the property without substantial injury to any of the interested parties, a tenant in common is equally entitled to a partition by sale. N.C.G.S. § 46-22(a) (2015); *Kayann Props.*, 268 N.C. at 19, 149 S.E.2d at 557.

Although a cotenant is generally entitled to partition as a matter of right, he may waive that right by either express or implied contract. *Kayann Props.*, 268 N.C. at 20, 149 S.E.2d at 557 ("Such an agreement may be verbal, if it has been acted upon, and it need not be expressed, but will be readily implied, and enforced, if necessary to the protection of the parties." (citation and quotation marks omitted)); *see also Dillingham v. Dillingham*, 202 N.C. App. 196, 206, 688 S.E.2d 499, 507 (2010) (recognizing doctrine of estoppel as it relates to partition proceedings will

<sup>2.</sup> In this case, the trial court's finding regarding the nonexistence of a contract implied-in-fact is a mixed finding and conclusion because it involves the application of a legal principle to a determination of facts. When the trial court's determination is a mixture of factual findings and legal conclusions, the determination is itself reviewable by the appellate courts. *Hall v. Hall*, 88 N.C. App. 297, 299, 363 S.E.2d 189, 191 (1987).

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not permit tenant in common to exercise his right to partition when he has by express or implied agreement waived that right). This is because:

In this State partition proceedings have been consistently held to be equitable in nature, and the court has jurisdiction to adjust all equities in respect to the property. Partition is always subject to the principle that he who seeks it by coming into equity for relief must do equity. Equity will not award partition at the suit of one in violation of his own agreement . . . .

*Kayann Props.*, 268 N.C. at 20, 149 S.E.2d at 557 (internal citations and quotation marks omitted).

Here, Laura was unable to provide the trial court with an express contract within which Alonza conveyed the property or waived his right to partition. Therefore, her sole ground for relief – if any – would necessarily rely on the existence of an implied-in-fact contract.

[A] contract implied in fact arises where the intent of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts. Such an implied contract is as valid and enforceable as an express contract. . . . It is essential to the formation of any contract that there be mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds. . . . With regard to contracts implied in fact, . . . one looks . . . to the actions of the parties showing an implied offer and acceptance.

Creech v. Melnik, 347 N.C. 520, 526-27, 495 S.E.2d 907, 911-12 (1998) (internal citations and quotation marks omitted).

At the *de novo* hearing on the petition to partition, the trial court considered caselaw, took testimony, and reviewed exhibits. In particular, the trial court examined three letters written by various attorneys on Laura's behalf over a four-year span. The first of these letters, dated 10 May 2001, was a proposed separation agreement. It enumerated suggestions as to how the couple might handle matters such as custody of the couple's minor child, his medical bills, and repairing the roof of the marital home. Relevant to the petition to partition, paragraph (7) of the letter read: "Home - You would agree to give Laura a deed conveying all your right, title and interest in the home found at 2010 Edenton Street, Kill Devil Hills, should she so request some time in the future." Alonza never signed or replied to Laura's offered separation agreement.

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On 8 March 2002, Laura's second attorney sent another proposed separation agreement to Alonza. That letter stated, in pertinent part, that

The Parties are presently owners as tenants by the entirety of a house and lot . . . . The Husband shall convey by General Warranty Deed to the Wife the marital home and the lot on which it is situated. The Husband shall convey to the Wife his interest in the above described real property simultaneous with the execution of this Agreement by the Parties. The Wife shall have sole possession and ownership of the marital home in which she now resides.

Once again, Alonza did not sign or reply to this letter.

On 6 June 2005, Laura's third lawyer sent a letter to Alonza. This letter simply stated, "[Laura] has indicated to me that if she assumes an outstanding tax liability of yours with the IRS, then you will deed to her the marital residence in which she resides with your son, Travis. Please advise as to what you have agreed to with Ms. Ward." For a third time, Alonza declined to respond in any respect.

At the hearing, the trial court also heard testimony. Specifically, the court heard directly from Alonza. In pertinent part, he testified as follows:

Q: When you and [Laura] separated did you have a separation agreement?

A: Not really.

Q: Did you ever enter a written separation agreement with [Laura]?

A: No, sir. I never signed anything.

. . . .

Q: So the equitable distribution suit is dismissed in 2011 and after that did you and [Laura] enter any type of agreement concerning the disposition or division of your home?

A: No, sir.

Q: At any point, [Alonza], have you and Laura Ward entered into any type of agreement concerning the disposition or division of your home?

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A: We discussed it but when we went to the court that first time--when we went to court the first time in '06 that is what that was all about, that is where we were at now.

Q: That was never resolved?

A: No, sir.

. . . .

Q: [Alonza], [Laura] never demanded child support from you following your departure, did she?

A: Our agreement was I paid for the van in lieu of child support and I would pay-I carried the insurance on him, Blue Cross Blue Shield, and I also had paid all of his doctor bills which was real close to \$16,000 and I also in-I believe it was-I'm not positive of the date but I can find out if I have to, I bought him a truck for \$9,000 and give him a thousand dollars . . . for his taxes and insurance in '07. And the truck I paid off and just give him the title and everything, then I give him a thousand dollars. And the first year we were separated, that Christmas, I give her \$400 and him \$300 in case.

. . . .

Q: And following your departure in September of 2000, did you ever contribute anything in a monthly payment or anything of that nature in the way of spousal support toward Laura Ward?

A: Like I said before, and I have that in the first lawyer she had, I have that where she sent me . . . Well, no because we had an agreement and I have that in writing. And of course I never signed that, she sent it to me from another lawyer. . . . Just like I said before, we had an agreement that I would pay the van payment instead of alimony or child support I meant.

The trial court also heard testimony from Laura. Initially, she testified that, on the day Alonza left, "he said the house was mine and everything that was in there." She also explained that it was her understanding that "the house was mine and I would take care of it." Contradictorily, however, when the trial court questioned Laura about the three letters she had attorneys send Alonza, the following exchange occurred:

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THE COURT: And for my clarification, were you at that time [you sent the letters] trying to reach some sort of settlement or agreement or trying to resolve the marital disputes?

[Laura]: Yes.

THE COURT: And for my clarification, I take it that the disputes over the property and all were not resolved and no final resolution was reached, is that correct?

[Laura]: Correct.

. . . .

THE COURT: Didn't you understand as a result of your litigation that if you did not have a written document conveying to you your ex-husband's interest in the house and lot on which the house sat that you were not the sole owner of the property, didn't you understand that?

[Laura]: Yes.

The trial court also heard from Christine Gray, the couple's third child. She testified that on two or three different occasions after Alonza and Laura separated, her father told her "he wasn't going to take the house away from [Laura] because she didn't have anything else." However, when asked if he made that statement, Alonza claimed, "If I did, I do not remember that."

On appeal, Laura relies on Christine's testimony as well as her own as establishing that Alonza said he was giving her the home. She also points to Alonza's testimony that an agreement existed between the parties that established Alonza would pay their youngest child's medical bills and also provide for his health insurance. Furthermore, she asserted that this testimony recognized he would pay all remaining car payments on the couple's van in place of child support or alimony. Alonza specifically noted that this agreement was in writing and sent to him by one of Laura's lawyers. Laura alleges that, if we compare these statements with the terms delineated in the first letter that one of her attorneys sent to Alonza, the two are in accord. She contends Alonza acknowledged acceptance of the offer set forth in the first proposed separation agreement. Viewing this evidence collectively, she maintains that the trial court erred in concluding an implied-in-fact contract did not arise over the fifteen years prior to the filing of the petition to partition.

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Our review of this issue is limited to an assessment of whether the trial court's findings of fact are supported by competent evidence and whether those findings support the court's conclusions of law and ensuing judgment. *Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176. In this case, the trial court found that there was neither a written agreement nor particular conduct or action sufficient to give rise to a contract implied-in-fact. We are satisfied that there is competent evidence to support this finding.<sup>3</sup>

The evidence tended to show that Alonza declined to endorse or return the offered separation agreements presented to him by Laura. This demonstrates that he never assented to the terms of these offers. Alonza confirmed this proposition by expressly testifying that he and Laura never entered into any agreement concerning disposition or division of the home. Despite initially testifying that she believed the house was hers, Laura conceded to the trial court that she continued to send letters to Alonza in an attempt to reach a consensus regarding the possible transfer of Alonza's interest in the home. She also acknowledged when questioned by the trial court that she understood she was not the sole owner of the property after she emerged from litigation about the marital estate without a written document conveying to her Alonza's interest in the home. Collectively, this evidence tends to establish that there was never a meeting of the minds as to any proposed agreement that Alonza convey to Laura his interest in the property and that Alonza never gave up his right to partition.

In terms of countervailing evidence, Christine testified that her father maintained that he would not take the house from her mother. However, Alonza testified that he did not remember making such a remark. Additionally, Laura argues that Alonza, through his testimony that an agreement existed that matched the terms of the first letter she sent him, essentially ratified the offer articulated within that letter. However, our courts have long recognized that when there is inconsistent evidence, the judge in a non-jury trial acts as both judge and jury and resolves any conflicts in the evidence. *G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 110, 362 S.E.2d 807, 810 (1987). It is the trial court's duty to weigh all of the competent evidence presented to it, and, "[i]f different inferences may be drawn from the evidence, [the trial judge] determines which inferences shall be drawn and which shall be rejected" as he is in the best position to evaluate such discrepancies. *Williams v. Pilot Life* 

<sup>3.</sup> We recognize this finding is a mixed finding of fact and conclusion of law. However, this does not affect our assessment of the validity of the finding.

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Ins. Co., 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975); Dep't of Transp. v. Elm Land Co., 163 N.C. App. 257, 264, 593 S.E.2d 131, 136 (2004) ("It is within the trial court's discretion to determine the weight and credibility given to all evidence presented during a non-jury trial. The trial court is in the best position to weigh the evidence, determine the credibility of witnesses and the weight to be given their testimony." (internal citations and quotation marks omitted)).

We conclude there is competent evidence to support the trial court's finding that there was no written agreement between Alonza and Laura pertaining to their rights in the property. There is also competent evidence to support the trial court's finding that there was "no particular conduct or action" taken by either party affecting ownership of the property or Alonza's right to seek partition of the property at a later date. Therefore, we are bound by both findings on appeal. *Hensgen*, 53 N.C. App. at 335, 280 S.E.2d at 769. In turn, these findings are sufficient to support the conclusion that no implied-in-fact contract was ever formed between Alonza and Laura that would make her sole owner of the property or waive his right to seek partition. Accordingly, we affirm the trial court as to this issue.

# III. Principles of Equity

[2] Laura also asserts the trial court erred in failing to apply principles of equity in ordering partition by sale as an equitable means of distributing the real property at issue. Specifically, she asserts that, although the trial court equitably determined that Alonza's failure to make an effort to resolve the marital dispute precludes him from claiming he should not share in the expenses Laura incurred maintaining the home, it failed to apply these same equitable principles in allowing for a partition.

Laura submits that Alonza may not come with unclean hands to the court to invoke its equitable powers. Laura maintains he has unclean hands because "[h]e admitted that he was in an adulterous affair with the co-petitioner, Marie W. Ward, and upon separating from the Respondent, immediately and illegally cohabitated with his co-petitioner" prior to his divorce from her. In her brief, she highlights that Alonza and Marie could have been criminally charged with a Class 2 misdemeanor and civilly sued for engaging in this relationship, but discloses that "[i]n light of the 'agreement' reached by the parties herein, this was not pursued[.]"

We have already recognized that partition proceedings are equitable in nature, and the court has jurisdiction to adjust all equities in respect to the property. *Henson v. Henson*, 236 N.C. 429, 430, 72 S.E.2d 873, 873-74 (1952). A court of equity seeking to do justice among tenants in

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common may either assign an improved or renovated portion of the property at issue to the person who undertakes those improvements or may reimburse that individual a reasonable allowance for that enhancement. *Holt v. Couch*, 125 N.C. 456, 461, 34 S.E. 703, 705 (1899). However, it is well-settled that a trial court will only deny a cotenant's right of partition where there has been an express or implied agreement not to partition, or where partition would make it impossible to fulfill the terms of an agreement. *Kayann Props.*, 268 N.C. at 20, 149 S.E.2d at 557. Alonza's relationship with Marie prior to his divorce from Laura has no bearing on the equities associated with the partitioning of a marital home, and Laura cites no authority suggesting otherwise on appeal.

Here, the trial court balanced the equities with respect to the property when it required Alonza to reimburse Laura for half of the expenses she incurred as a result of paying taxes on and maintaining the property. Therefore, Laura's argument that the trial court did not apply principles of equity is simply incorrect.

#### Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Chief Judge McGEE and Judge DAVIS concur.

# CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 MARCH 2016)

DOE v. CATAWBA COLL. Mecklenburg Affirmed No. 16-394 (15CVS14140)

GRUBBS v. GRUBBS Forsyth Reversed in Part,
No. 16-129 (13CVD634) Vacated in Part, and
Remanded in Part.

IN RE R.A.S. Forsyth Vacated. No. 16-805 (15JB249)

LEE v. COLLINS Cumberland Affirmed No. 16-789 (15CVS7239)

SNYDER v. GOODYEAR TIRE N.C. Industrial Affirmed

& RUBBER CO. Commission No. 16-309 (13-003826)

STATE v. BAKER Durham No Error No. 16-453 (13CRS54775)

STATE v. BAKER Mecklenburg No Error No. 16-645 (14CRS223560)

(14CR37595)

STATE v. BOUKNIGHT Mecklenburg Affirmed

No. 16-544 (14CRS247477-84) (15CRS16966)

STATE v. BROOKS Pasquotank No Error No. 16-674 (14CRS50957)

STATE v. CARLTON Pitt Affirmed.

No. 16-880 (13CRS56753) (16CRS31)

STATE v. DOMINGUEZ Forsyth Affirmed. No. 16-919 (06CRS51434)

STATE v. EDWARDS Graham NO ERROR IN PART; No. 16-974 (14CRS50285-86) REVERSED IN (15CRS253) PART; AND

5CRS253) PAR'I; AND REMANDED FOR RE-SENTENCING.

STATE v. HOLDEN Wake Dismissed

No. 16-685 (14CRS221485)

Mecklenburg

Appeal dismissed.

STATE v. HOSTETLER

No. 16-691

No. 16-825

No. 16-935

STATE v. SAUNDERS

STATE v. SHEPHERD

No. 16-680 (13CRS206652-656) (13CRS206659-660) (13CRS206809-810) STATE v. ISLEY Guilford No Error No. 16-401 (14CRS65788) STATE v. MARSHALL Hyde No Error No. 16-731 (15CRS174) (15CRS50125) STATE v. MOOSE No Error Rowan No. 16-867 (14CRS50104-05) STATE v. MORRISON Affirmed. Cabarrus No. 16-942 (13CRS2694-96) (13CRS51693) (16CRS182-184) STATE v. MUHAMMAD Mecklenburg No prejudicial error No. 16-306 (13CRS240853-54) in part, dismissed in part. STATE v. OXNER Union No Error No. 16-859 (13CRS52896) (13CRS52897) STATE v. ROA No error in part; Hoke No. 16-769 Remanded for (13CRS50993) (13CRS51225-26) correction of clerical (14CRS695-96) error in 13 CRS 50993. STATE v. ROJAS Vacated and Mecklenburg No. 16-802 (15CRS208860) Remanded (15CRS208863) STATE v. SANTANA Wake Affirmed

(14CRS218611)

(14CRS54331-32) (14CRS54334) No Error

No Error

Forsyth

Guilford

(12CRS68426) (12CRS68430)

No Error

STATE v. WILLIAMS Currituck

No. 16-855 (15CRS127-129)

STATE v. WILLIAMSON Wake No Error No. 16-820 (12CRS252)